

No. 15983 ✓

United States
Court of Appeals
for the Ninth Circuit

THOMAS M. ROBINSON, Appellant,

vs.

WILLIAM G. ELLIOT, Appellee.

Transcript of Record

(In Two Volumes)

VOLUME I.

(Pages 1 to 103, inclusive)

Appeal from the United States District Court
for the District of Montana

FILED

JUN 12 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, District
of Montana, Billings Division

No. 1727

WILLIAM G. ELLIOT, Plaintiff,

vs.

THOMAS M. ROBINSON, Defendant.

COMPLAINT

Plaintiff, by his attorneys, for his complaint herein alleges:

(1) This complaint is filed and this action is instituted pursuant to the provisions of Section 322 of the Internal Revenue Code of 1939 (U.S.C. Title 26, Sec. 322), and Section 6402 of the Internal Revenue Code of 1954 for the recovery of Federal income taxes and interest thereon, paid for the calendar years 1946, 1947, 1948, 1949, 1950, 1951, 1952 and 1953.

(2) The plaintiff is an individual, residing at the Northern Hotel, Billings, Montana, and is a resident of the District of Montana.

(3) This action against Thomas M. Robinson, U. S. District Director of Internal Revenue for the District of Montana, arises under the Act of June 25, 1948, 62 Stat. 932, United States Code, Title 28, Sec. 1340.

(4) This action arises under the laws of the

United States, to wit: Section 117 of the Internal Revenue Code of 1939.

(5) The Plaintiff duly filed his Federal income tax return for the calendar year 1946 with the above-named defendant. The plaintiff paid, on or before March 15, 1947, the amount of \$1,985.67, the Federal income tax for 1946 shown to be due by said return.

(6) The Plaintiff filed with the defendant a claim for refund of \$1,041.97 income tax paid for the year 1946. A true copy of said claim for refund is attached hereto and marked Exhibit "A".

(7) The plaintiff duly filed his Federal income tax return for the calendar year 1947 with the above named defendant. The plaintiff paid on or before March 15, 1948, the amount of \$2,353.71, the Federal income tax shown to be due by said return. On or about November 16, 1950, pursuant to a notice and demand received from the above-named defendant, the plaintiff paid a deficiency in income tax for the calendar year 1947 in the amount of \$342.33, together with interest thereon of \$52.30, said payments being made to the above-named defendant.

(8) On or before March 15, 1951, the plaintiff duly filed with the defendant a timely claim for refund of \$1,376.81, income tax paid for the year 1947. A true copy of said claim for refund is attached hereto and marked Exhibit "B".

(9) The plaintiff duly filed his Federal income

tax return for the calendar year 1948 with the above named defendant. The plaintiff paid on or before March 15, 1949, the amount of \$2,189.30, the Federal income tax shown to be due by said return. On or about November 16, 1950, pursuant to a notice and demand received from the above named defendant, the plaintiff paid a deficiency in income tax for the calendar year 1948 in the amount of \$1,056.44, together with interest thereon of \$98.03, said payments being made to the above-named defendant.

(10) On or before March 15, 1952, the plaintiff duly filed with the defendant a timely claim for refund of \$1,527.52, income tax paid for the year 1948. A true copy of said claim for refund is attached hereto and marked Exhibit "C".

(11) The plaintiff duly filed his Federal income tax return for the calendar year 1949 with the above-named defendant. The plaintiff paid on or before March 15, 1950, the amount of \$2,454.60, the Federal income tax shown to be due by said return. During the calendar year 1953 and pursuant to a notice and demand received from the above-named defendant, the plaintiff paid a deficiency in income tax for the calendar year 1949 in the amount of \$512.30, together with interest of \$120.11, said payments being made to the above-named defendant.

(12) On or before March 15, 1953, the plaintiff duly filed with the defendant a timely claim for refund of \$940.30, income tax paid for the year 1949. A true copy of said claim for refund is at-

tached hereto and marked Exhibit "D". On or about March 15, 1953, the plaintiff duly filed with the defendant a timely amended claim for refund of \$2,454.60 or such other amount as is legally refundable, plus interest, for the year 1949. A true copy of said claim for refund is attached hereto and marked Exhibit "E".

(13) The plaintiff duly filed his Federal income tax return for the calendar year 1950 with the above-named defendant. The plaintiff paid on or before March 15, 1951, the amount of \$3,281.31, the Federal income tax shown to be due by said return. During the calendar year 1953 and pursuant to a notice and demand received from the above-named defendant, the plaintiff paid a deficiency in income tax for the calendar year 1950 in the amount of \$79.14, together with interest thereon of \$13.81, said payment being made to the above-named defendant.

(14) On or before March 15, 1954, the plaintiff duly filed with the defendant a timely claim for refund of \$1,525.48, income tax paid for the year 1950. A true copy of said claim for refund is attached hereto and marked Exhibit "F". On or before March 15, 1954, the plaintiff duly filed with the defendant a timely amended claim for refund of \$3,360.45 or such other amount as is legally refundable, plus interest, for the taxable year 1950. A true copy of said claim for refund is attached hereto and marked Exhibit "G".

(15) The plaintiff duly filed his Federal income tax return for the calendar year 1951 with the

above-named defendant. The plaintiff paid, on or before March 15, 1952, the amount of \$3,865.43, the Federal income tax shown to be due by said return.

(16) On or about July 8, 1954, the plaintiff duly filed with the defendant a timely claim for refund of \$3,865.43, income tax paid for the year 1951. A true copy of said claim is attached hereto and marked Exhibit "H".

(17) The plaintiff duly filed his Federal income tax return for the calendar year 1952 with the above-named defendant. The plaintiff paid on or before March 15, 1953, the amount of \$4,315.39, the Federal income tax shown to be due by said return.

(18) On or about July 8, 1954, the plaintiff duly filed with the defendant a timely claim for refund of \$4,315.39, income tax paid for the year 1952. A true copy of said claim is attached hereto and marked Exhibit "I".

(19) The plaintiff duly filed his Federal income tax return for the calendar year 1953 with the above-named defendant. The plaintiff paid, on or before March 15, 1954, the amount of \$4,179.30, the Federal income tax shown to be due by said return.

(20) On or about July 8, 1954, the plaintiff duly filed with the defendant a timely claim for refund of \$4,179.30, income tax paid for the year 1953. A true copy of said claim is attached hereto and marked Exhibit "J".

(21) The Commissioner of Internal Revenue dis-

allowed the claims for refund for 1946, 1947, 1948 and 1949. This complaint is filed within two years of the time of the receipt of all of the statutory disallowances of the aforesaid refund claims.

(22) On January 14, 1946, the plaintiff together with Thomas W. Elliot and his wife, Evelyn W. Elliot, transferred to the F. A. Buttrey Company, a Montana corporation, certain real estate and a business building located thereon in Kalispell, Montana. The total consideration was payable commencing on February 1, 1946, at the rate of \$19,000.00 a year for ten (10) years, at which time a final payment of \$75,000.00 would be payable unless the buyer elected not to make the final payment, in which event the deed to the said property would be returned to the sellers by the escrow holder thereof. Said transfer was carried out pursuant to an agreement between the above-described parties. Said agreement was entitled "Lease Agreement and Purchase Option" and it was executed on January 14, 1946. Said agreement is expressly incorporated herein by reference and a true copy of same is hereto attached and marked Exhibit "K". A subsequent agreement between the above named parties entitled "Memorandum Agreement" was executed on February 1, 1946 and said agreement is expressly incorporated herein by reference and a true copy is attached hereto and marked Exhibit "L".

(23) The plaintiff was and is entitled to \$10,000.00 a year out of the \$19,000.00 yearly payments and to \$39,473.68 of the final payment of \$75,000.00.

The amount received by the plaintiff in 1946 was \$10,000.00.

(24) Prior to entering into the agreements with the F. A. Buttrey Company referred to in paragraph (22) above, the plaintiff owned an undivided one-half interest in the above-described property. Said property had been held by the plaintiff for more than six months. The plaintiff's adjusted basis for determining gain under the Internal Revenue Code of 1939 with respect to said property was \$19,321.63 on January 14, 1946.

(25) The Commissioner of Internal Revenue, in disallowing the 1946 claim for refund, erroneously treated the \$10,000.00 received by the plaintiff in 1946 as ordinary rental income. The transfer set forth in paragraph (22) above resulted in a long term capital gain under Section 117 of the Internal Revenue Code of 1939.

(26) The plaintiff in 1947 received \$10,000.00 pursuant to the agreements set forth in paragraph (22) above.

(27) The Commissioner of Internal Revenue, in disallowing the 1947 claim for refund, erroneously treated the \$10,000.00 received by the plaintiff in 1947 as ordinary rental income. The transfer set forth in paragraph (22) above resulted in a long term capital gain under Section 117 of the Internal Revenue Code of 1939.

(28) The plaintiff in 1948 received \$10,000.00 pursuant to the agreement set forth in paragraph (22) above.

(29) The Commissioner of Internal Revenue, in disallowing the 1948 claim for refund, erroneously treated the \$10,000.00 received by the plaintiff in 1948 as ordinary rental income. The transfer set forth in paragraph (22) above resulted in a long term capital gain under Section 117 of the Internal Revenue Code of 1939.

(30) The plaintiff in 1949 received \$10,000.00 pursuant to the agreements set forth in paragraph (22) above.

(31) The Commissioner of Internal Revenue, in disallowing the 1949 claim for refund, erroneously treated the \$10,000.00 received by the plaintiff in 1949 as ordinary rental income. The transfer set forth in paragraph (22) above resulted in a long term capital gain under Section 117 of the Internal Revenue Code of 1939.

(32) The plaintiff in 1950 received \$10,000.00 pursuant to the agreements set forth in paragraph (22) above.

(33) The Commissioner of Internal Revenue, in disallowing the 1950 claim for refund, erroneously treated the \$10,000.00 received by the plaintiff in 1950 as ordinary rental income. The transfer set forth in paragraph (22) above resulted in a long term capital gain under Section 119 of the Internal Revenue Code of 1939.

(34) The Commissioner of Internal Revenue has taken no action to date regarding the claims for refund for the years 1951, 1952 and 1953. This com-

plaint is filed after a period of six months has elapsed since the filing of each of the refund claims for the aforesaid years.

(35) The plaintiff, in each of the years 1951, 1952 and 1953, received \$10,000.00 pursuant to the agreements set forth in paragraph (22) above. Said amounts were erroneously reported and taxed in the plaintiff's Federal income tax return for 1951, 1952 and 1953 as ordinary rental income. The transfer set forth in paragraph (22) above resulted in a long term capital gain under Section 117 of the Internal Revenue Code of 1939.

(36) By virtue of the aforesaid, the defendant becomes and is indebted to the plaintiff for \$1,041.97, income tax paid for the calendar year 1946, and for \$1,429.11 income tax paid together with interest paid thereon, for the calendar year 1947, and for \$1,626.55 income tax paid, together with interest paid thereon, for the calendar year 1948, and for \$2,532.14 income tax paid, together with interest paid thereon, for the calendar year 1949, and for \$2,648.23 income tax paid, together with interest paid thereon, for the calendar year 1950, and for \$2,989.97 income tax paid for the calendar year 1951, and for \$3,367.33 income tax paid for the calendar year 1952, and for \$3,023.56 income tax paid for the calendar year 1953, which amounts have not heretofore been refunded or credited, together with interest on such amounts as provided by law.

Wherefore, the plaintiff demands judgment

against the defendant in the amount of \$18,658.86 with interest thereon as provided by law, together with the costs of this action.

Dated May 23, 1955.

FELT, FELT & BURNETT,
/s/ By JAMES R. FELT,
Attorneys for Plaintiff.

EXHIBIT "A"

(Copy)

CLAIM

* * * * *

State of Montana,
County of Yellowstone—ss.

Name of taxpayer or purchaser of stamps: Wm. G. Elliot.

Return address: Kalispell, Montana.

Present Residence: Northern Hotel, Billings, Montana.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Montana.

2. Period: (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1946, to Dec. 31, 1946.

Exhibit "A"—(Continued)

3. Character of assessment or tax: Individual Income.

4. Amount of assessment, \$1,985.67; dates of payment: Not available.

5. Date stamps were purchased from the Government.....

6. Amount to be refunded: \$1,041.97.

7. Amount to be abated (not applicable to income, gift, or estate taxes):.....

8. The time within which this claim may be legally filed expires, under section 322(b) of Internal Revenue Code, is unknown.

The deponent verily believes that this claim should be allowed for the following reasons: As stated in schedules and exhibits attached hereto, and made a part of this claim, as follows:

Schedule No. 1	Page 1.
Schedule No. 1-a	Page 2.
Schedule No. 2	Page 3.
Exhibit A	Page 4.
Exhibit A-1 1950 Claim	Page 5.

* * * * *

Exhibit "A"—(Continued)

Page

WILLIAM G. ELLIOT
Billings, MontanaAdjustments—1946
Schedule 1

Items—Income	Return	Additions	Deductions	Corrected
1. Salary & Wages	\$ 1,500.00	\$	\$	\$ 1,500.00
2. Dividends	2,027.00			2,027.00
3. Net Gain—Capital Assets		4,270.88		4,270.88
4. Buffalo Block	11,393.52		8,833.64	2,559.88
5. Adjusted Gross Income	<u>\$14,920.52</u>			<u>\$10,357.76</u>
6. Deductions				
7. Contributions	\$ 2,238.00			\$ 2,238.00
8. State Income Tax	29.86			29.86
9. Medical Expense	2,500.00			2,500.00
10. Travel Expense	769.80	769.80		
11. Total Deductions	<u>\$ 5,537.66</u>			<u>\$ 4,767.86</u>
12. Net Income	<u>\$ 9,382.86</u>	<u>\$5,040.68</u>	<u>\$8,833.64</u>	<u>\$ 5,589.90</u>

Page 2

Adjustments Explained—1946
Schedule 1-a

Item 3. Net Gain—Capital Assets	\$4,270.88
Previously Reported	None
Adjustment	<u>\$4,270.88</u>

Gain on sale of property on installment basis as determined in Exhibit-A attached hereto, is based upon facts and interpretation of a lease and option drawn on February 1, 1946.

Property was offered for sale, for \$265,000.00. After some negotiation, purchaser made a counter-offer as set out in the lease and option, to lease the property for ten years at \$19,000.00 per year, with option to purchase the property at the end of

Exhibit "A"—(Continued)

the ten-year period for \$75,000.00, or a total of \$265,000.00. Purchaser agreed to pay taxes, insurance and maintenance. Transcript of agreement is attached hereto, as Exhibit A-1.

Item 4. Buffalo Block, reported	\$8,833.64
Corrected	None
	<hr/>
Adjustment	\$8,833.64

See explanation for Item 3, reporting gain on Installment sale of Capital Assets, in lieu of rentals, as reported under Item 4 in error.

Item 10. Travel Expenses, reported	\$ 769.80
Corrected	None
	<hr/>
Adjustment	\$ 769.80

Deduction withdrawn as a result of R.A.R., 9/20/50, as to travel expense.

NOTE: Records could not be found as to date of filing of original return. Claim is therefore filed since the time within which this claim may be legally filed, is uncertain.

Relief is also sought under provisions of Section 275(c) Internal Revenue Code upon the same grounds, although not now so provided.

Page 3

Tax Computation—1946

Schedule 2

Net Income from Schedule No. 1	\$5,589.90
Less: Exemptions (2)	1,000.00
	<hr/>
Taxable Net Income	\$4,589.90
	<hr/>
Combined Tentative Normal Tax and Surtax	\$ 993.37
Less: 5%	49.67
	<hr/>
Total Tax—Corrected	\$ 943.70
	<hr/> <hr/>

Exhibit "A"—(Continued)

	Corrected
Corrected Assessment	\$ 943.70
Income Tax Withheld	\$ 163.20
Paid on Estimate	3,582.66
Assessed on Return	(1,760.19)
	1,985.67
Overassessment Claimed	\$ 1,041.97

EXHIBIT A

WM. G. ELLIOT
Billings, Montana

T. W. ELLIOT
Kalispell, Montana

		Page
Net Gain—Gain of Capital Assets		
Sale Price	\$265,000	
Cost		
Land	\$15,000.00	
Buildings	\$68,000.00	
Improvements—1924		
1925		
1929	5,873.79	
	\$73,873.79	
Less: Depreciation Reserve		
12/31/45 per R.A.R.	\$50,054.17	
1/1 to 1/31/46	176.35	
	50,230.52	
	23,643.27	
		38,643
Net Profit of Sale	\$226,356	

Exhibit "A"—(Continued)

	Installments	Reportable Profit	Taxable Profit
Payments 2/1/46	\$ 19,000.00	\$ 16,229.35	\$ 8,114.68
2/1/47	19,000.00	16,229.35	8,114.68
2/1/48	19,000.00	16,229.35	8,114.68
2/1/49	19,000.00	16,229.35	8,114.68
2/1/50	19,000.00	16,229.35	8,114.68
2/1/51	19,000.00	16,229.35	8,114.68
2/1/52	19,000.00	16,229.35	8,114.68
2/1/53	19,000.00	16,229.35	8,114.68
2/1/54	19,000.00	16,229.35	8,114.68
2/1/55	19,000.00	16,229.35	8,114.68
2/1/56	75,000.00	64,063.23	32,061.62
	<u>\$265,000.00</u>	<u>\$226,356.73</u>	<u>\$113,208.42</u>

Summary

Wm. G. Elliot—1946-55	\$10,000.00	\$ 4,270.88	\$42,708.80
Wm. G. Elliot—1956	39,473.68	16,874.54	16,874.54
Tom Elliot—1946-55	9,000.00	3,843.80	38,438.00
Tom Elliot—1956	35,526.32	15,187.08	15,187.08
			<u>\$113,208.42</u>

EXHIBIT "B"

(Copy)

CLAIM

* * * * *

State of Montana,
County of Yellowstone—ss.

Name of taxpayer or purchaser of stamps: Wm. G. Elliot.

Return address: Kalispell, Montana.

Present Residence: Northern Hotel, Billings, Montana.

The deponent, being duly sworn according to law,

Exhibit "B"—(Continued)

deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Montana.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1947, to Dec. 31, 1947.

3. Character of assessment or tax: Individual Income.

4. Amount of assessment: \$2,696.04; dates of payment: Not available.

5. Date stamps were purchased from the Government.....

6. Amount to be refunded: \$1,376.81.

7. Amount to be abated (not applicable to income, gift, or estate taxes):.....

8. The time within which this claim may be legally filed expires, under section 322(b) of Internal Revenue Code, on March 15, 1951.

The deponent verily believes that this claim should be allowed for the following reasons: As stated in schedules and exhibits attached hereto and made a part of this claim, as follows:

Schedule No. 1	Page 1.
Schedule No. 1-a	Page 2.
Schedule No. 2	Page 3.
Exhibit A	Page 4.
Exhibit A-1	1950 Claim Page 5.

Exhibit "B"—(Continued)

WM. G. ELLIOT
Billings, Montana

Adjustments—1947
Schedule 1

Items—Income	R.A.R. 9/20/50	Additions	Deductions	Page 1 Corrected
Salary & Wages	\$ 1,500.00	\$	\$	\$1,500.00
Dividends	2,817.00			2,817.00
Net Gain—Capital Assets		4,270.88		4,270.88
Joint Ownership	8,752.74		8,752.74	
	<u>\$13,069.74</u>			<u>\$8,587.88</u>
Deductions				
Contributions	\$ 840.00			\$ 840.00
State Income Tax	154.67			154.67
Medical Expense	1,054.18		195.82	1,250.00
Travel Expenses			80.90	
	<u>\$ 2,048.85</u>			<u>\$2,244.67</u>
Net Income	<u>\$11,020.89</u>	<u>\$4,270.88</u>	<u>\$8,948.56</u>	<u>\$6,343.21</u>

Adjustments Explained—1947
Schedule 1-a

	Page 2
Item 3. Net Gain—Capital Assets, Corrected	\$4,270.88
Reported	None
	<u> </u>
Adjustment	<u>\$4,270.88</u>

Gain on sale of property on installment basis as determined in Exhibit A attached hereto, is based upon facts and interpretation of a lease and option drawn on February 1, 1946.

Property was offered for sale, for \$265,000.00. After some negotiation, purchaser made a counter-offer as set out in the lease and option, to lease the property for ten years at \$19,000.00 per year, with option to purchase the property at the end of the ten-year period for \$75,000.00, or a total of \$265,000.00.

Exhibit "B"—(Continued)

Purchaser agreed to pay taxes, insurance and maintenance. Transcript of agreement is attached hereto, as Exhibit A-1.

Item 4. Joint Ownership, Reported	\$8,572.74
Corrected	None
Adjustment	<u>\$8,572.74</u>

See explanation for Item 3, reporting gain on Installment sale of Capital Assets, in lieu of rentals, as reported under Item 4 in error.

Item 9. Medical Expense, Corrected	\$1,250.00
Reported	1,054.18
Adjustment	<u>\$ 195.82</u>
Medical Expense Listed	\$1,707.67
Adjusted Gross Income—	\$6,343.21
Less: 5% of Adjusted Gross Income	126.86
	<u>\$1,580.81</u>
Excess over limitation of	
\$1,250.00	330.81
Corrected Deduction	<u>\$1,250.00</u>
Item 10. Travel Expense, Corrected	\$ 80.90
Reported	None
Adjustment	<u>\$ 80.90</u>

This covers travel expense included under Item 4, in R.A.R., which item is now removed in full. Travel is now claimed under Item 10, as Investor's expense.

Page 3

Tax Computation—1947
Schedule 2

Net Income from Schedule No. 1	\$6,343.21
Less: Exemptions (1)	500.00
Taxable Net Income	<u>\$5,843.21</u>

Exhibit "B"—(Continued)

Combined Tentative Normal Tax and Surtax	\$1,319.23
Income Tax Withheld	\$ 163.10
Paid on Estimate	2,857.80
Assessed, Original Return	(667.19)
Assessed, R.A.R., 9/20/50	342.33
	<hr/>
	2,696.04
	<hr/>
Overassessment Claimed	\$1,376.81
	<hr/> <hr/>

[Note: Exhibit A—Net Gain—Sale of Capital Assets is the same as set out at pages 16-17.]

EXHIBIT "C"

(Copy)

CLAIM

State of Montana,
County of Yellowstone—ss.

Name of taxpayer or purchaser of stamps: Wm. G. Elliot.

Return address: Kalispell, Montana.

Present Residence: Northern Hotel, Billings, Montana.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Montana.

Exhibit "C"—(Continued)

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1948, to Dec. 31, 1948.

3. Character of assessment or tax: Individual Income.

4. Amount of assessment, \$3,145.74; dates of payment: Not available.

5. Date stamps were purchased from the Government:.....

6. Amount to be refunded: \$1,528.52.

7. Amount to be abated (not applicable to income, gift, or estate taxes):.....

8. The time within which this claim may be legally filed expires, under section 322(b) of Internal Revenue Code on March 15, 1952.

The deponent verily believes that this claim should be allowed for the following reasons: As stated in schedules and exhibits attached hereto and made a part of this claim, as follows:

Schedule No. 1	Page 1.
Schedule No. 1-a	Page 2.
Schedule No. 2	Page 3.
Exhibit A	Page 4.
Exhibit A-1 1950 Claim	Page 5.

* * * * *

Exhibit "C"—(Continued)

Wm. G. Elliot
Billings, Montana

Adjustments—1948
Schedule 1

	R.A.R.			Page 1
Items—Income	9/20/50	Additions	Deductions	Corrected
Salaries & Wages	\$ 1,500.00	\$	\$	\$1,500.00
Dividends	3,245.00			3,245.00
Interest	900.00			900.00
Net Gain—Capital Assets		4,270.88		4,270.88
Joint Ownership	8,833.64		8,833.64	
Adjusted Gross Income	<u>\$14,478.64</u>			<u>\$9,915.88</u>
Deductions				
Contributions	\$ 250.00			\$ 250.00
Interest	84.09			84.09
State Income Tax	193.94			193.94
Medical Expense	291.46		228.14	519.60
Total Deductions	<u>\$ 819.49</u>			<u>\$1,047.63</u>
Net Income	<u>\$13,659.15</u>	<u>\$4,270.88</u>	<u>\$9,061.78</u>	<u>\$8,868.25</u>

Exhibit "C"—(Continued)

Adjustments Explained—1948

Schedule 1-a

	Page 2
Item 4. Net Gain—Capital Assets, Corrected	\$4,270.88
Reported	None

Adjustment	\$4,270.88

Gain on sale of property on installment basis as determined in Exhibit A attached hereto, is based upon facts and interpretation of a lease and option drawn on February 1, 1946.

Property was offered for sale, for \$265,000.00. After some negotiation, purchaser made a counter-offer as set out in the lease and option, to lease the property for ten years at \$19,000.00 per year, with option to purchase the property at the end of the ten-year period for \$75,000.00, or a total of \$265,000.00. Purchaser agreed to pay taxes, insurance and maintenance. Transcript of agreement is attached hereto, as Exhibit A-1.

Item 5. Joint Ownership, Reported	\$8,833.64
Corrected	None

Adjustment	\$8,833.64

See explanation for Item 4, reporting gain on Installment sale of Capital Assets, in lieu of rentals, as reported under Item 5 in error.

Item 10. Medical Expense, Corrected	\$ 519.60
Reported	291.46

Adjustment	\$ 228.14

Medical Expense Listed	\$1,015.39
Corrected Adjusted Gross Income—	
\$9,915.88	
Unallowable—5% of Adjusted	
Gross	495.79

Allowable Deduction	\$ 519.60

Exhibit "C"—(Continued)

Tax Computation—1948

Schedule 2

Page 3

Net Income from Schedule No. 1	\$8,868.25	
Less: Exemptions (2)	1,200.00	
	<hr/>	
Taxable Net Income	\$7,668.25	
	<hr/>	
Combined Normal Tax and Surtax		\$1,860.48
Less: Reduction—12% plus \$20.00		243.26
		<hr/>
Total Income Tax—Corrected		\$1,617.22
Income Tax Withheld	\$ 138.40	
Paid on Estimate	1,162.50	
Credit, prior year	667.19	
Assessed on Return	121.21	
Assessed, R.A.R., 9/20/50	1,056.44	
	<hr/>	
		3,145.74
		<hr/>
Overassessment Claimed		\$1,528.52
		<hr/>
		<hr/>

[Note: Exhibit A—Net Gain—Sale of Capital Assets is the same as set out at pages 16-17.]

EXHIBIT "D"

(Copy)

CLAIM

* * * * *

State of Montana,
County of Yellowstone—ss.

Name of taxpayer or purchaser of stamps: Wm. G. Elliot.

Return address: Kalispell, Montana.

Present Residence: Northern Hotel, Billings, Montana.

Exhibit "D"—(Continued)

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Montana.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1949, to Dec. 31, 1949.

3. Character of assessment or tax: Individual Income.

4. Amount of assessment, \$2,454.60; dates of payment: Not available.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$940.30.

7. Amount to be abated (not applicable to income, gift, or estate taxes):

8. The time within which this claim may be legally filed expires, under section 322(b) of Internal Revenue Code on March 15, 1953.

The deponent verily believes that this claim should be allowed for the following reasons: As stated in schedules and exhibits attached hereto and made a part of this claim, as follows:

Schedule No. 1	Page 1.
Schedule No. 1-a	Page 2.
Schedule No. 2	Page 3.
Exhibit A	Page 4.
Exhibit A-1 1950 Claim	Page 5.

Exhibit "D"—(Continued)

Page 1

Wm. G. Elliot
Billings, Montana

Adjustments—1949
Schedule 1

Items—Income	Return	Additions	Deductions	Corrected
Salaries & Wages	\$ 1,500.00	\$	\$	\$1,500.00
Dividends	2,197.00			2,197.00
Interest	1,050.00			1,050.00
Net Gain—Capital Assets		4,270.88		4,270.88
Buffalo Block	10,000.00		10,000.00	
	<hr/>			<hr/>
Adjusted Gross Income	\$14,747.00			\$9,017.88
	<hr/>			<hr/>
Deductions				
Contributions	\$ 200.00			\$ 200.00
Interest	34.70			34.70
State Income Tax	304.52			304.52
Hotel Expense, Billings	2,555.00	2,555.00		
	<hr/>			<hr/>
Total Deductions	\$ 3,094.22			\$ 539.22
	<hr/>			<hr/>
Net Income	\$11,652.78	\$6,825.88	\$10,000.00	\$8,478.66
	<hr/>	<hr/>	<hr/>	<hr/>

Page 2

Adjustments Explained—1949
Schedule 1-a

Item 4. Net Gain—Capital Assets, Corrected	\$ 4,270.88
Reported	None
	<hr/>
Adjustment	\$ 4,270.88

Gain on sale of property on installment basis as determined in Exhibit A attached hereto, is based upon facts and interpretation of a lease and option drawn on February 1, 1946.

Property was offered for sale, for \$265,000.00. After some negotiation, purchaser made a counter-offer as set out in the lease and option, to lease the property for ten years at \$19,000.00 per year, with option to purchase the property at the end of the ten-year period for \$75,000.00, or a total of \$265,000.00. Purchaser agreed to pay taxes, insurance and maintenance. Transcript of agreement is attached hereto, as Exhibit A-1.

Exhibit "D"—(Continued)

Item 5. Buffalo Block, Reported	\$10,000.00
Corrected	None
Adjustment	<u>\$10,000.00</u>

See explanation for Item 4, reporting gain on Installment sale of Capital Assets, in lieu of rentals, as reported under Item 5 in error.

Item 10. Hotel Expense, Reported	\$ 2,555.00
Corrected	None
Adjustment	<u>\$ 2,555.00</u>

Deduction withdrawn as a result of R.A.R., 9/20/50, as to travel expense.

Tax Computation—1949
Schedule 2

Page 3

Net Income from Schedule No. 1	\$8,478.66
Less: Exemptions (2)	1,200.00
Taxable Net Income	<u>\$7,278.66</u>
Combined Normal Tax & Surtax Net Income	\$1,743.60
Less: Reduction—12% plus \$20.00	229.23
Total Income Tax—Corrected	\$1,514.30
Income Tax Withheld	\$ 126.00
Payment on Estimate	1,713.54
Assessed on Return	615.06
	<u>2,454.60</u>
Overassessment Claimed	<u>\$ 940.30</u>

[Note: Exhibit A—Net Gain—Sale of Capital Assets is the same as set out at pages 16-17.]

EXHIBIT "E"

SUPPLEMENTAL REFUND CLAIM

* * * * *

Name of taxpayer or purchaser of stamps: William G. Elliot.

Street Address: Northern Hotel.

City, postal zone number, and State: Billings, Montana.

1. District in which return (if any) was filed: Montana.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1949, to Dec. 31, 1949.

3. Kind of tax: Income tax.

4. Amount of assessment, \$2454.60; dates of payment: by March 15, 1950.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$2454.60, or such other amount as is legally refundable, plus interest.

7. Amount to be abated (not applicable to income, estate, or gift taxes):

The claimant believes that this claim should be allowed for the following reasons:

The original refund claim previously filed claimed capital gain treatment on payments received from certain property, using the installment basis method of computing gain on the transaction.

Exhibit "E"—(Continued)

This claim is filed to claim the right to exclude all payments received during 1949 on this transaction on the grounds that a sale occurred in 1946 and that payments received in subsequent years are not income.

For further details, reference is made to Revenue Agents Reports and other records on file with the Treasury Department.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: 3-13, 1954.

/s/ WILLIAM G. ELLIOT.

EXHIBIT "F"

(Copy)

CLAIM

* * * * *

State of Montana,
County of Yellowstone—ss.

Name of taxpayer or purchaser of stamps: Wm. G. Elliot.

Business Address: Northern Hotel, Billings, Montana.

Residence: Northern Hotel, Billings, Montana.

The deponent, being duly sworn according to law, deposes and says that this statement is made on

Exhibit "F"—(Continued)

behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Montana.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1950, to Dec. 31, 1950.

3. Character of assessment or tax: Individual Income.

4. Amount of assessment, \$3,281.31; dates of payment:

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$1,525.48.

7. Amount to be abated (not applicable to income, gift, or estate taxes):

8. The time within which this claim may be legally filed expires, under section 322(b) of Internal Revenue Code.

The deponent verily believes that this claim should be allowed for the following reasons: As stated in schedules and exhibits attached hereto and made a part of this claim, as follows:

Schedule No. 1	Page 1.
Schedule No. 1-a	Page 2.
Schedule No. 2	Page 3.
Exhibit A	Page 4.
Exhibit A-1	Page 5.

Exhibit "F"—(Continued)

Page

Wm. G. Elliot
Billings, Montana

Adjustments—1950
Schedule 1

Items—Income	Return	Additions	Deductions	Corrected
1. Salary & Wages	\$ 1,500.00	\$	\$	\$ 1,500.00
2. Dividends	2,286.01			2,286.01
3. Interest	2,100.00			2,100.00
4. Net Gain—Capital Assets		4,270.88		4,270.88
5. Rents	8,833.57		8,833.57	
6. Adjusted Gross Income	<u>\$14,719.58</u>			<u>\$10,150.00</u>
Deductions				
7. Standard	\$ 1,000.00			\$ 1,000.00
8. Total Deductions	<u>\$ 1,000.00</u>			<u>\$ 1,000.00</u>
9. Net Income	<u>\$13,719.58</u>	<u>\$4,270.88</u>	<u>\$8,833.57</u>	<u>\$ 9,156.89</u>

Page 2

Adjustments Explained—1950
Schedule 1-a

Item 4. Net Gain—Capital Assets, Corrected	\$4,270.88
Reported	None
Adjustment	<u>\$4,270.88</u>

Gain on sale of property on installment basis as determined in Exhibit A attached hereto, is based upon facts and interpretation of a lease and option drawn on February 1, 1946.

Property was offered for sale, for \$265,000.00. After some negotiation, purchaser made a counter-offer as set out in the lease and option, to lease the property for ten years at \$19,000.00 per year, with option to purchase the property at the end of the ten-year period for \$75,000.00, or a total of \$265,000.00. Purchaser agreed to pay taxes, insurance and maintenance. Transcript of agreement is attached hereto, as Exhibit A-1.

Exhibit "F"—(Continued)

Item 5. Rents, Reported	\$8,833.57
Corrected	None
	<hr/>
Adjustment	\$8,833.57
	<hr/> <hr/>

See explanation for Item 4, reporting gain on Installment sale of Capital Assets, in lieu of rentals, as reported under Item 5 in error.

Page 3

Tax Computation—1950
Schedule 2

Net Income From Schedule No. 1	\$9,156.89	\$
Less: Exemptions (2)	1,200.00	
	<hr/>	
Taxable Net Income	\$7,956.89	
	<hr/> <hr/>	
Combined Normal Tax and Surtax		\$1,947.07
Less: Reduction—9% plus \$16.00		191.24
		<hr/>
Total Income Tax—Corrected		\$1,755.83
Income Tax Withheld	\$ 132.60	
Paid on Estimate	2,328.60	
Assessed on Return	120.11	
	<hr/>	
		3,281.31
		<hr/>
Overassessment Claimed		\$1,525.48
		<hr/> <hr/>

[Note: Exhibit A—Net Gain—Sale of Capital Assets is the same as set out at pages 16-17.]

EXHIBIT "G"
CLAIM

* * * * *

Name of taxpayer or purchaser of stamps: William G. Elliot.

Street address: Northern Hotel.

City, postal zone number, and State: Billings, Montana.

1. District in which return (if any) was filed: Montana.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1950, to Dec. 31, 1950.

3. Kind of tax: Income.

4. Amount of assessment, \$3360.45; dates of payment, March 15, 1951; 1953.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$3360.45 or such amount as is legally refundable plus interest.

7. Amount to be abated (not applicable to income, estate, or gift taxes):

Refund of the amount described on line 6 above is hereby demanded together with interest as provided by law.

William G. Elliot, together with Thomas W. Elliot, sold a business building located in Kalispell, Montana to the F. A. Buttrey Company, a Montana corporation, on January 14, 1946. The sale price

Exhibit "G"—(Continued)

was payable, commencing on Feb. 1, 1946, at the rate of \$19,000 a year for 10 years, at which time a final payment of \$75,000 was payable unless the buyer elected not to make the final payment, in which event the deed to the said property would be returned to the sellers.

The taxpayer erroneously reported on their 1950 U. S. Income Tax Return the yearly payment of \$19,000 received in 1950 as rental income and paid tax thereon at ordinary income tax rate.

Under the Federal income tax law, a completed sale occurred in 1946 resulting in a long term capital gain. Therefore, all payments received during 1950 are not subject to Federal income taxation.

For further details, the Revenue Agent's Reports and other records and documents on file with the Treasury Department concerning the above taxpayer and involving the taxable years 1946, 1947, 1948, and 1949 are expressly incorporated herein by reference.

* * * * *

EXHIBIT "I"

CLAIM

* * * * *

Name of taxpayer or purchaser of stamps: William G. Elliot.

Street address: Northern Hotel.

City, postal zone number, and State: Billings, Montana.

1. District in which return (if any) was filed: Montana.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1952, to Dec. 31, 1952.

3. Kind of tax: Income.

4. Amount of assessment, \$4,315.39; dates of payment: March 15, 1953.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$4,315.39 or such amount as is legally refundable plus interest.

7. Amount to be abated (not applicable to income, estate, or gift taxes):

The claimant believes that this claim should be allowed for the following reasons:

Refund of the amount described on line 6 above is hereby demanded together with interest as provided by law.

Exhibit "I"—(Continued)

William G. Elliot, together with Thomas W. Elliot, sold a business building located in Kalispell, Montana to the F. A. Buttrey Company, a Montana corporation, on January 14, 1946. The sale price was payable, commencing on Feb. 1, 1946, at the rate of \$19,000 a year for 10 years, at which time a final payment of \$75,000 was payable unless the buyer elected not to make the final payment, in which event the deed to the said property would be returned to the sellers.

The taxpayer erroneously reported on his 1952 U. S. Income Tax Return his share of the yearly payment of \$19,000 received in 1952 as rental income and paid tax thereon at ordinary income tax rates.

Under the Federal income tax law, a completed sale occurred in 1946 resulting in a long term capital gain. For further details, the Revenue Agent's Reports and other records and documents on file with the Treasury Department concerning the above taxpayer and involving the taxable years 1946, 1947, 1948, 1949, and 1950, are expressly incorporated herein by reference.

* * * * *

EXHIBIT "J"

CLAIM

Name of taxpayer or purchaser of stamps: William G. Elliot.

Street address: Northern Hotel.

City, postal zone number, and State: Billings, Montana.

1. District in which return (if any) was filed: Montana.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1953, to Dec. 31, 1953.

3. Kind of tax: Income.

4. Amount of assessment, \$4,179.30; dates of payment, March 15, 1954.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$4,179.30 or such amount as is legally refundable plus interest.

7. Amount to be abated (not applicable to income, estate, or gift taxes):

The claimant believes that this claim should be allowed for the following reasons:

Refund of the amount described on line 6 above is hereby demanded together with interest as provided by law.

William G. Elliot, together with Thomas W.

Exhibit "J"—(Continued)

Elliot, sold a business building located in Kalispell, Montana to the F. A. Buttrey Company, a Montana corporation, on January 14, 1946. The sale price was payable, commencing on Feb. 1, 1946, at the rate of \$19,000 a year for 10 years, at which time a final payment of \$75,000 was payable unless the buyer elected not to make the final payment, in which event the deed to the said property would be returned to the sellers.

The taxpayer erroneously reported on his 1953 U. S. Income Tax Return his share of the yearly payment of \$19,000 received in 1953 as rental income and paid tax thereon at ordinary income tax rates.

Under the Federal income tax law, a completed sale occurred in 1946 resulting in a long term capital gain. For further details, the Revenue Agent's Reports and other records and documents on file with the Treasury Department concerning the above taxpayer and involving the taxable years 1946, 1947, 1948, 1949, and 1950, are expressly incorporated herein by reference.

* * * * *

EXHIBIT "K"

LEASE AGREEMENT AND PURCHASE
OPTION

This Agreement, made and entered into this 14th day of January, 1946, by and between T. W. Elliot and Evelyn W. Elliot, husband and wife, of Kalispell, Montana, and W. G. Elliot, a widower, of

Exhibit "K"—(Continued)

Kalispell, Montana, parties of the first part, and F. A. Buttrey Company, a Montana corporation, with its principal office at Havre, Montana, the party of the second part,

Witnesseth:

1. That the said parties of the first part, for and in consideration of the rents, covenants and agreements herein mentioned and to be paid and performed by the said party of the second part, its successors and assigns, have demised, leased and let, and by these presents do demise, lease and let unto said party of the second part, its successors and assigns, the following described premises situated in the City of Kalispell, County of Flathead, State of Montana, to wit:

Lots Eight (8), Nine (9), Ten (10), Eleven (11) and Twelve (12) of Block Fifty-five (55) of the original townsite of Kalispell, Montana, according to the official map or plat thereof on file and of record in the office of the County Clerk and Recorder of said County of Flathead, together with all improvements thereon, subject, however, to all lease-hold interests of each and all of the tenants now occupying said premises, or any portion thereof.

Also Lots Five (5) and Six (6) of Block Seventy-Four (74) of said original townsite of Kalispell, Montana.

To Have and To Hold the above described property unto the party of the second part, for and dur-

Exhibit "K"—(Continued)

ing the full term of ten (10) years beginning with the 1st day of February, 1946, and ending on the 31st day of January, 1956.

2. The party of the second part for itself, its successors and assigns, promises and agrees to pay to said first parties, their heirs, executors, administrators, or assigns, as rent for the above described property, the sum of Nineteen Thousand and No/100 Dollars (\$19,000.00) per lease year, payable in cash in advance, the first year's rent to be paid at the time of the execution of this agreement, the receipt whereof is hereby acknowledged by the first parties, and that the rent for each succeeding year during the term of this lease shall be paid by said second party on or before the first day of February of each year hereafter, and during the full period covered by this agreement.

3. It is expressly understood and agreed by and between the parties hereto that the party of the second part has viewed said premises and accepts them in their present condition, and that said second party will, at its own expense, keep said improvements in good repair during the term of this lease; and the party of the second part further covenants and agrees not to commit nor suffer any waste to be committed upon said premises, and that unless the option of purchase herein granted to the party of the second part is exercised as herein provided, said second party agrees to return said property and premises to the first parties at the end of the lease period herein provided, or the sooner ter-

Exhibit "K"—(Continued)

mination thereof, in as good condition as it now is or may hereafter be put in by the party of the second part, reasonable wear and tear and damage by the elements alone excepted.

4. The party of the second part further covenants and agrees at its own expense to keep the buildings and improvements upon the premises above described insured against damage or loss by fire at their full insurable value, but in no event for a sum less than \$175,000.00, and to pay all premiums on any and all policies issued thereon as such premiums become due, which policies shall provide that all loss, if any, thereunder, shall be payable to the parties of the first part as their interests may appear, provided, however, that in the event of a total loss, the maturity of this contract may be accelerated at the option of the party of the second part, and said second party may thereupon elect to exercise the option herein given to purchase said premises by the payment of the amount provided in the purchase option hereinafter given, to wit: \$75,000.00, as therein provided, and the said second part shall in addition thereto, and in addition to the rentals then paid hereunder, pay all of the remaining rental for the full ten year period of this lease, less the amount actually paid to said first parties under said insurance policies for the loss sustained thereunder.

5. It is further understood and agreed that the party of the second part shall take over all insurance now being carried upon said premises and

Exhibit "K"—(Continued)

agrees that at the time of the taking of possession of said premises hereunder, the second party will pay to the first parties all unearned portions of the premiums heretofore paid by said first parties for all of said insurance computed as of February 1st, 1946.

6. As further consideration of this agreement, the party of the second part shall and hereby agrees to pay all State, County and City taxes levied or assessed against all of the property above described and against any and all improvements thereon, whether in existence or hereafter made thereon, during the term of this lease. The party of the second part further agrees at its own cost and expense to fully maintain said property and furnish all fuel, light, power and water in connection with the use and occupancy thereof.

7. The party of the second part shall have and is hereby given the right to assign or transfer this lease and to sub-let said premises, or any part thereof, during the term of this lease agreement, and said second party shall have the right and it shall be its duty to collect any and all rentals from any and all sub-lessees and sub-tenants of said premises during said lease period, and all rentals collected by said second party upon said premises, or any part thereof, during the period of this lease, from and after January 31st, 1946, shall be paid to and be deemed the property of the party of the second part. In other words, it is expressly under-

Exhibit "K"—(Continued)

stood and agreed by and between the parties hereto that all advance rentals due on and after February 1st, 1946, shall, during the continuance of this agreement, be collected and retained by the second party herein; that all back rentals and rentals which have accrued, but remain unpaid as of January 31st, 1946, shall belong to and be collected by the parties of the first part; and that all advance rentals paid prior to February 1st, 1946, shall be adjusted between the parties as of February 1st, 1946, when possession of said premises is delivered to said second party.

8. It is further understood and agreed by and between the parties hereto that the party of the second part shall have the right to make alterations and improvements in and upon said premises during the term of this lease agreement, except that before any major improvements or remodeling is done in or upon the building situated on said premises, the consent in writing of the first parties shall be obtained therefor. It is further understood and agreed that any fixtures or improvement or any movable material which may be placed in or upon said premises by the second party during the term of this lease, may, at the option of said second party, be removed from said premises upon the expiration of this lease, or the sooner termination thereof, provided such removal may be accomplished without unreasonable injury or damage to the buildings upon said premises and that any damage done is repaired or replaced by said second party.

Exhibit "K"—(Continued)

9. The parties of the first part covenants and agrees with the second party that if said second party shall pay the rents and perform the covenants, agreements and conditions on its part as herein provided, it shall have, hold and enjoy the quiet and peaceful possession of said demised premises during the full term of this lease.

10. It is further understood and agreed that in the event of damage to said premises by fire which shall render said premises untenable, and the second party desires to restore said premises to tenable condition, the insurance benefits herein provided for shall be released and paid to said second party and used by it for the restoration of said premises. In the event of any damage to said premises by fire or otherwise, the party of the second part agrees to promptly notify the first parties in order that said first parties may enter in and upon said premises to investigate the loss and the cost of repairs and replacements thereof. But if the damage be such that the second party does not elect to, and does not in fact repair or reconstruct the premises within a period of six months after the occurrence of such damage, then, this lease shall be deemed terminated as of the end of said six month period, unless the party of the second part shall have exercised its option of purchase under the acceleration clause herein as provided in paragraph 4 hereof.

11. The party of the second part hereby further

Exhibit "K"—(Continued)

expressly agrees that during the term of this lease it will faithfully comply with all sanitary regulations of the State of Montana, and the ordinances of the City of Kalispell including, but without limitation, the requirement to keep the sidewalks adjoining said premises free and clear of snow and ice and to otherwise comply with the City ordinances and the laws of the State of Montana applicable to the ownership and occupancy of said premises. It is, however, expressly understood and agreed by and between the parties hereto that in the event it becomes necessary to make any basic structural improvements to said building by reason of and under order of public authority, the expenses of such improvement upon said building on said premises shall be borne by the parties of the first part, but it is expressly understood and agreed that this burden shall be limited to only such structural improvements as are ordered by public authority.

12. As further consideration for this agreement, the party of the second part shall have and is hereby given the right and option to purchase said leased premises and property above described for the sum of Seventy-five Thousand and No/100 Dollars (\$75,000.00) at any time during the three month period beginning with November 1st, 1955 and ending with January 31st, 1956. It is mutually understood and agreed by the parties hereto that said option of purchase can only be exercised during the three month period immediately above specified except under the acceleration provisions in

Exhibit "K"—(Continued)

paragraph 4 herein, and that said option may be exercised by said second party by giving either of said first parties notice in writing of said second party's intention to exercise said option, and by depositing with the Conrad National Bank of Kalispell at Kalispell, Montana, the said sum of \$75,000.00 to the credit of said first parties. It is understood and agreed, however, that in lieu of such personal service of notice of intention to exercise said option, such notice may be sent by registered mail addressed to either of the first parties at Kalispell, Montana, and that the date of depositing such notice by registered mail at Kalispell, Montana, addressed to either of said first parties, and the depositing of such funds in said bank, shall be deemed the date of the exercise of said option.

13. It is further understood and agreed by and between the parties hereto that at the time of the execution of this agreement, the parties of the first part shall likewise execute a good and sufficient Warranty Deed conveying the property hereinabove described to said second party, free and clear of liens and encumbrances, which deed, together with a copy of this agreement, shall be deposited in escrow with said Conrad National Bank of Kalispell with instructions to said Bank that said deed be delivered to the second party only if and when said second party exercises its option of purchase hereunder in keeping with the terms and conditions herein set forth. The parties of the first part covenant and agree that they are seized and pos-

Exhibit "K"—(Continued)

sessed of title in fee to said premises and that they will furnish an Abstract of Title covering the real estate above described, prepared and certified to by a duly licensed abstractor in and for the State of Montana, which Abstract of Title shall be delivered to Messrs. Walchli and Korn, attorneys at law, Kalispell, Montana, on or before February 1st, 1946, for the purpose of examination of said title by said attorneys, with the understanding that upon the completion of said examination, said Abstract of Title shall be returned by said attorneys to said Bank and shall thereafter be held by it in escrow with said deed and a copy of this contract, as hereinabove provided. It is understood and agreed that in the event the party of the second part shall fail to exercise said option of purchase as and within the time hereinabove specified, the said Conrad National Bank as such escrow agent shall have the right, and is hereby given the authority, to return said deed and abstract to the first parties, or either of them. It is further understood and agreed that if upon the examination of said abstract of title, it appears that the title is defective, but that such defect can be remedied, then, and in such event, the parties of the first part agree to immediately undertake and diligently prosecute the correction of any such defect at their expense. It is further agreed that any and all charges the said Conrad National Bank shall make as such escrow agent for its services hereunder shall be borne and paid for by the party of the second part.

Exhibit "K"—(Continued)

14. It is further understood and agreed that in the event the party of the second part shall vacate said premises or abandon the same during the term of this lease agreement, the parties of the first part may, at their option and without terminating this lease, enter into and upon said premises and remove the second party's signs therefrom and re-let the same for the account and benefit of said second party for such rent and upon such terms as shall be agreeable to said second party, without such re-entry working a waiver of or a forfeiture of the rents to be paid and the covenants to be performed by said second party during the full term of this lease agreement as herein provided, but it is understood and agreed that the first parties shall not be under any obligation to so enter said premises and sub-let the same. In the event the first parties shall exercise their option to re-enter said premises and sub-let the same as in this paragraph above provided, the first parties are hereby expressly authorized to make any and all repairs, changes, alterations and additions in or to said demised premises that the first parties may deem necessary and convenient to the use of said property, and if a sufficient sum is not realized from such re-letting of said premises by said first parties after paying all of the costs and expense of such repairs, changes, alterations or additions, plus the expense of such re-letting and the collection of the rent accruing therefrom, the first parties shall apply the rent so collected as a credit upon any and all rental due or

Exhibit "K"—(Continued)

to become due to said first parties under the terms of this lease, and the party of the second part hereby expressly covenants and agrees to pay to said first parties at the end of any lease year, any deficiency in rental which may exist by reason of such handling of said property, by the first parties.

15. It is further mutually understood and agreed by and between the parties hereto that all of the covenants and agreements herein contained are and shall be binding upon the heirs, personal representatives, successors and assigns of the respective parties hereto.

In Witness Whereof the first parties have hereunto set their hands and seals, and the second party has hereunto caused its corporate name to be subscribed and its seal affixed by its proper officers thereunto duly authorized.

[Seal] /s/ T. W. ELLIOT,

[Seal] /s/ EVELYN W. ELLIOT,

[Seal] /s/ W. G. ELLIOT,

First Parties.

F. A. BUTTREY COMPANY,
a Corporation,

/s/ By G. O. OMLIE,
Vice-President,
Second Party.

Attest:

/s/ A. C. OLSON,
Secretary.

Exhibit "K"—(Continued)

State of Montana,
County of Flathead—ss.

On this 14th day of January, 1946, before me, Daniel J. Korn, a Notary Public for the State aforesaid, personally appeared T. W. Elliot and Evelyn W. Elliot, husband and wife, and W. G. Elliot, known to me to be the persons who executed the foregoing instrument as First Parties, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year first above written.

/s/ DANIEL J. KORN,

Notary Public for the State of Montana residing
at Kalispell, Montana. My Commission expires
Sept. 22, 1946.

State of Montana,
County of Flathead—ss.

On this 14th day of January, 1946, before me, Daniel J. Korn, a Notary Public for the State aforesaid, personally appeared G. O. Omlie, known to me to be the Vice-President of F. A. Buttrey Company, the corporation that executed the foregoing instrument as Second Party, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my

Exhibit "K"—(Continued)

hand and affixed my Notarial Seal the day and year first above written.

/s/ DANIEL J. KORN,

Notary Public for the State of Montana residing at Kalispell, Montana. My Commission expires Sept. 22, 1946.

EXHIBIT "L"

MEMORANDUM AGREEMENT

This Agreement, made and entered into this 1st day of February, 1946, by and between T. W. Elliot and Evelyn W. Elliot, husband and wife, of Kalispell, Montana, and W. G. Elliot, a widower, of Kalispell, Montana, parties of the first part, and F. A. Buttrey Company, a Montana corporation, with its principal office at Havre, Montana, the party of the second part,

Witnesseth:

That Whereas, the parties hereto have heretofore on the 14th day of January, 1946, entered into a written Lease Agreement covering Lots 8, 9, 10, 11 and 12 of Block 55 of the original townsite of Kalispell, Montana, commonly known as the Buffalo Block; and also covering Lots 5 and 6 of Block 74 of said original townsite of Kalispell, the term of which Lease Agreement begins February 1, 1946 and ends on the 31st day of January, 1956, and

Whereas, said Lease Agreement grants the above

Exhibit "L"—(Continued)

named second party the right and option to purchase all of the above described property for a stated consideration, provided such option is exercised by said second party on or between November 1, 1955 and January 31, 1956, and

Whereas, each of said parties has a duly executed copy of said Lease Agreement and Option,

Now Therefore, it is mutually understood and agreed that the first parties shall, in contemplation of the exercise of said option by said second party, immediately deliver to the Conrad National Bank of Kalispell, Montana, the following papers:

1. An executed Warranty Deed conveying the above described property to the second party;

2. An abstract of title covering said property showing said first parties to be vested with a merchantable title, free and clear of encumbrances, as of the date of said Lease and Option Agreement, January 14, 1946;

the foregoing instrument to be held by said Bank in escrow and to be delivered by said Bank to the second party if and when said Option of Purchase is exercised in keeping with the terms thereof and proof of full payment by said second party under said Lease Agreement as of the time of the exercise of said option.

In the event said Option of Purchase is not exercised by the second party on or before January 31, 1956, the above mentioned papers shall be returned by said Bank to the first parties, their heirs or assigns.

Exhibit "L"—(Continued)

In Witness Whereof the first parties have hereunto set their hands and seals, and the second party has hereunto caused its corporate name to be subscribed and its seal affixed by its proper officers thereunto duly authorized.

[Seal] /s/ W. G. ELLIOT,

[Seal] /s/ EVELYN W. ELLIOT,

[Seal] /s/ T. W. ELLIOT,

First Parties.

F. A. BUTTREY COMPANY, a
corporation,

/s/ By G. O. OMLIE,

Vice-President,

Second Party.

State of Montana,

County of Flathead—ss.

On this 1st day of February, 1946, before me, Daniel J. Korn, a Notary Public for the State aforesaid, personally appeared T. W. Elliot and Evelyn W. Elliot, husband and wife, and W. G. Elliot, known to me to be the persons who executed the foregoing instrument as First Parties, and acknowledge to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year first above written.

/s/ DANIEL J. KORN,

Notary Public for the State of Montana. Residing
at Kalispell, Montana. My Commission expires
Sept. 22, 1946.

Exhibit "L"—(Continued)

State of Montana,
County of Flathead—ss.

On this 1st day of February, 1946, before me, Daniel J. Korn, a Notary Public for the State aforesaid, personally appeared G. O. Omlie, known to me to be the Vice-President of F. A. Buttrey Company, the corporation that executed the foregoing instrument as Second Party, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year first above written.

/s/ DANIEL J. KORN,
Notary Public for the State of Montana. Residing
at Kalispell, Montana. My Commission expires
Sept. 22, 1946.

[Endorsed]: Filed May 25, 1955.

[Title of District Court and Cause No. 1727.]

ANSWER

Comes now the defendant, by his attorney of record, Krest Cyr, United States Attorney for the District of Montana, and in answer to plaintiff's complaint herein:

A. Denies every allegation not admitted, qualified or otherwise specifically referred to below.

B. Further answering the petition:

1. Denies the allegations in paragraph 1 except those relating to the provisions of Section 322 of the Internal Revenue Code of 1939 admitted in other numbered paragraphs to follow.

2. Admits the allegations in paragraph 2.

3. Admits the allegations in paragraph 3.

4. Denies the allegations in paragraph 4.

5. Admits the allegations in paragraph 5.

6. Admits the allegations in the first sentence of paragraph 6 and alleges that the claim was filed on March 10, 1951. Admits the allegations in the second sentence of paragraph 6 except to deny that Exhibit "A" is a complete copy of the original claim and also to deny all allegations in the claim for refund not elsewhere herein admitted.

7. Admits the allegations in paragraph 7.

8. Admits the allegations in paragraph 8 except to deny that Exhibit "B" is a complete copy of the original claim and also to deny all allegations in the claim for refund not elsewhere herein admitted.

9. Admits the allegations in the first and last sentences of paragraph 9 and denies all other allegations in such paragraph.

10. Admits the allegations in paragraph 10 except to deny that Exhibit "C" is a complete copy of the original claim and also to deny all allegations in the claim for refund not elsewhere herein admitted.

11. Admits the allegations in the first sentence of paragraph 11, denies the allegations in the second

sentence, and also admits the allegations in the third sentence except to allege that the interest payment was only \$114.21.

12. Denies the allegations in paragraph 12 except to admit that a claim for refund of \$940.30 was filed on March 10, 1951; to admit that another claim for refund of \$2,454.60 was filed on March 15, 1953; to deny that Exhibits "D" and "E" are complete copies of the original claims; and to deny all allegations in such claims not elsewhere herein admitted.

13. Admits the allegations in paragraph 13 except to allege that the plaintiff paid only \$3,148.71 of the sum of \$3,281.31 and also paid only \$12.90 as interest assessed on the deficiency; and to allege that payments aggregating \$3,148.71 were made in the amounts of \$582.15 on March 15, 1950, of \$1,746.45 on September 19, 1950, and of \$820.11 on March 15, 1951.

14. Denies the allegations in paragraph 14 except to admit that a claim for refund of \$1,525.48 was filed on March 10, 1951 and disallowed with statutory notice on April 22, 1954; to admit that another claim for refund of \$3,360.45 was filed on March 15, 1954; to admit that Exhibits "F" and "G" are true but incomplete copies of such claims; and specifically denies all allegations in paragraph 14 and in such refund claims as are not elsewhere herein admitted.

15. Admits the allegations in the first sentence of paragraph 15 and denies the allegations in the second sentence thereof except to admit that the

plaintiff paid \$2,000 before March 15, 1952, and also paid \$1,710.23 on September 17, 1952.

16. Admits the allegations in paragraph 16 except to deny that Exhibit "H" is a complete copy of the original claim and also to deny all allegations in the claim for refund not elsewhere herein admitted.

17. Admits the allegations in the first sentence of paragraph 17 and denies the allegations in the second sentence thereof except to admit that the plaintiff paid \$3,000 on or before March 15, 1953.

18. Admits the allegations in paragraph 18 except to deny that Exhibit "I" is a complete copy of the original claim and also to deny all allegations in the claim for refund not elsewhere herein admitted.

19. Admits the allegations in paragraph 19 but alleges that a portion of the amount paid was credited to the tax due upon plaintiff's 1954 return, leaving a net payment of only \$4,010.10.

20. Admits the allegations in paragraph 20 except to deny that Exhibit "J" is a complete copy of the original claim and also to deny all allegations in the claim for refund not elsewhere herein admitted.

21. Admits the allegations in the first sentence of paragraph 21 and denies the allegations in the second sentence of such paragraph.

22. Denies the allegations in the first sentence of paragraph 22 and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 22.

23. Denies the allegations in paragraph 23 except to admit that the plaintiff received an amount of \$10,000 in 1946.

24. Denies the allegations in paragraph 24.

25. Denies the allegations in paragraph 25.

26. Denies the allegations in paragraph 26 except to admit that the plaintiff in 1947 received \$10,000.

27. Denies the allegations in paragraph 27.

28. Denies the allegations in paragraph 28 except to admit that the plaintiff in 1948 received \$10,000.

29. Denies the allegations in paragraph 29.

30. Denies the allegations in paragraph 30 except to admit that the plaintiff in 1948 received \$10,000.

31. Denies the allegations in paragraph 31.

32. Denies the allegations in paragraph 32 except to admit that the plaintiff in 1950 received \$10,000.

33. Denies the allegations in paragraph 33.

34. Admits the allegations in paragraph 34 and also alleges that the 1951, 1952 and 1953 claims for refund were disallowed with statutory notice dated July 5, 1955.

35. Denies the allegations in paragraph 35 except to admit that the plaintiff in each of the years 1951, 1952 and 1953 received \$10,000.

36. Denies the allegations in paragraph 36 except to admit that no part of the amounts therein set forth have been refunded or credited.

Affirmative Defense

37. The plaintiff's individual federal income tax return for the calendar year 1946 was filed and his payments for the tax reported thereon were made on or before March 15, 1947. Later, on March 10, 1951, he filed a claim for refund of \$1,041.97 of the tax so paid. Such claim for refund was not filed within three years from the time the return was filed or within two years from the time the tax was paid, as required by applicable provisions in Section 322(b) of the Internal Revenue Code of 1939. The Court has no jurisdiction except to dismiss the pending action in so far as it relates to plaintiff's asserted claim for the calendar year 1946.

38. The Court is requested to order a reply to the affirmative defense in paragraph 37 of this answer, as provided in Rule 7(a).

Wherefore, defendant demands judgment that plaintiff's complaint be dismissed, together with the costs of this action.

KREST CYR,

United States Attorney,

/s/ MICHAEL J. O'CONNELL,

Assistant U. S. Attorney.

Attorneys for the Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 5, 1955.

[Title of District Court and Cause No. 1727.]

AMENDMENT TO COMPLAINT

Plaintiff, by his attorneys, for his amendment to his complaint herein alleges:

1. Paragraph (22) of the Complaint is amended so that, as amended, it shall read exactly as now written with the addition of the following sentence at the end thereof: On or about November 5th, 1955, the above-mentioned F. A. Buttrey Company, elected to make the agreed payment of \$75,000.00 and said sum was paid to the plaintiff and to Thomas W. Elliot and his wife, Evelyn W. Elliot.

2. Paragraph (24) of the Complaint is amended by striking out the figure \$19,321.63 and replacing it with the figure of \$20,321.63.

Dated June 15, 1956.

FELT, FELT, & BURNETT,
/s/ By JACK W. BURNETT,
Attorneys for Plaintiff.

[Endorsed]: Filed June 15, 1956.

In The United States District Court, District
of Montana, Billings Division

No. 1727

WILLIAM G. ELLIOT, Plaintiff,

vs.

THOMAS M. ROBINSON, Defendant.

No. 1728

THOMAS W. ELLIOT and EVELYN W. EL-
LIOT, Plaintiffs,

vs.

THOMAS M. ROBINSON, Defendant.

CONSOLIDATION FOR TRIAL

The above entitled cases are hereby consolidated
for trial.

Dated, June 15, 1956.

FELT, FELT, & BURNETT,
/s/ By JACK W. BURNETT,
Attorneys for Plaintiffs.

KREST CYR,
U. S. Attorney,
/s/ By DALE F. GALLES,
Attorney for Defendant.

[Endorsed]: Filed June 15, 1956.

[Title of District Court and Cause Nos. 1727-1728.]

STIPULATION OF DOCUMENTARY
EVIDENCE

The following documents are stipulated as evidence in these cases:

Copy of "Lease Agreement and Purchase Option" which is attached to the complaints.

Copy of "Memorandum Agreement" which is attached to the complaints.

Copy of "Affidavit and Statement By Seller to Purchase Under Bulk Sales Law" which is attached to the complaint in Case No. 1728.

Dated June 15, 1956.

FELT, FELT, & BURNETT,
/s/ By JACK W. BURNETT,
Attorneys for Plaintiffs.

KREST CYR,
U. S. Attorney,
/s/ By DALE F. GALLES,
Attorneys for Defendant.

[Endorsed]: Filed June 15, 1956.

[Title of District Court and Cause No. 1727.]

STIPULATION OF FACTS

1. This action is instituted pursuant to the provisions of Section 322 of the Internal Revenue

Code of 1939 (U.S.C Title 26, Sec. 322) for the recovery of Federal income taxes and interest thereon, paid for the calendar years 1946, 1947, 1948, 1949, 1950, 1951, 1952, and 1953.

2. The plaintiff is an individual, residing at the Northern Hotel, Billings, Montana, and is a resident of the District of Montana.

3. This action against Thomas M. Robinson, U. S. District Director of Internal Revenue, arises under the Act of June 25, 1948, 62 Stat. 932, United States Code, Title 28, Sec. 1340.

4. The plaintiff duly filed his Federal income tax return for the calendar year 1946 with the above-named defendant. The plaintiff paid, on or before March 15, 1947, the amount of \$1,985.67, the Federal income tax for 1946 shown to be due by said return.

5. The plaintiff filed with the defendant a claim for refund of \$1,041.97 income tax paid for the year 1946. A true copy of said claim for refund is attached to the complaint and marked Exhibit "A", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case. Said claim for refund was filed on March 10, 1951 and therefore was not filed within the time limit required by Section 322(b) of the 1939 Internal Revenue Code.

6. The plaintiff duly filed his Federal income tax return for the calendar year 1947 with the above named defendant. The plaintiff paid on or

before March 15, 1948, the amount of \$2,353.71, the Federal income tax shown to be due by said return. On or about November 16, 1950, pursuant to a notice and demand received from the above-named defendant, the plaintiff paid a deficiency in income tax for the calendar year 1947 in the amount of \$342.33, together with interest thereon of \$52.30, said payments being made to the above-named defendant.

7. On or before March 15, 1951, the plaintiff duly filed with the defendant a timely claim for refund of \$1,376.81, income tax paid for the year 1947. A true copy of said claim for refund is attached to the complaint and marked Exhibit "B", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

8. The plaintiff duly filed his Federal income tax return for the calendar year 1948 with the above-named defendant. The plaintiff paid the amount of \$2,089.30. On or about November 16, 1950, pursuant to a notice and demand received from the above-named defendant, the plaintiff paid a deficiency in income tax for the calendar year 1948 in the amount of \$1,056.44, together with interest thereon of \$98.03, said payments being made to the above-named defendant.

9. On or before March 15, 1952, the plaintiff duly filed with the defendant a timely claim for refund of \$1,527.52, income tax paid for the year 1948. A true copy of said claim for refund is

attached to the complaint and marked Exhibit "C", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

10. The plaintiff duly filed his Federal income tax return for the calendar year 1949 with the above-named defendant. The plaintiff paid on or before March 15, 1950, the amount of \$2,454.60, the Federal income tax shown to be due by said return. During the calendar year 1953 and pursuant to a notice and demand received from the above-named defendant, the plaintiff paid a deficiency in income tax for the calendar year 1949 in the amount of \$512.30, together with interest of \$114.21, said payments being made to the above-named defendant.

11. On or before March 15, 1953, the plaintiff duly filed with the defendant a timely claim for refund of \$940.30, income tax paid for the year 1949. A true copy of said claim for refund is attached to the Complaint and marked Exhibit "D", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case. On or about March 15, 1953, the plaintiff duly filed with the defendant another timely claim for refund of \$2,454.60 or such other amount as is legally refundable, plus interest, for the year 1949. A true copy of said claim for refund is attached to the Complaint and marked Exhibit "E", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

12. The plaintiff duly filed his Federal income tax return for the calendar year 1950 with the above-named defendant. The plaintiff paid on or before March 15, 1951, the amount of \$3,281.31, the Federal income tax shown to be due by said return. During the calendar year 1953 and pursuant to a notice and demand received from the above-named defendant, the plaintiff paid a deficiency in income tax for the calendar year 1950 in the amount of \$79.14, together with interest thereon of \$12.90, said payment being made to the above-named defendant.

13. On or before March 15, 1954, the plaintiff duly filed with the defendant a timely claim for refund of \$1,525.48, income tax paid for the year 1950. A true copy of said claim for refund is attached to the Complaint and marked Exhibit "F", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case. On or before March 15, 1954, the plaintiff duly filed with the defendant another timely claim for refund of \$3,360.45 or such other amount as is legally refundable, plus interest, for the taxable year 1950. A true copy of said claim for refund is attached to the Complaint and marked Exhibit "G", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

14. The plaintiff duly filed his Federal income tax return for the calendar year 1951 with the above-named defendant. The plaintiff paid, on or

before March 15, 1952, the amount of \$2,155.20 and paid \$1,710.23 principal and \$51.31 interest on September 17, 1952, pursuant to extension of time granted, making a total tax paid of \$3,865.43, the Federal income tax shown to be due by said return.

15. On or about July 8, 1954, the plaintiff duly filed with the defendant a timely claim for refund of \$3,865.43, income tax paid for the year 1951. A true copy of said claim is attached to the Complaint and marked Exhibit "H", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

16. The plaintiff duly filed his Federal income tax return for the calendar year 1952 with the above-named defendant. The plaintiff paid on or before March 15, 1953, the amount of \$3,169.20, paid \$1,000 on April 9, 1953, and \$146.19 principal and \$4.02 interest on September 2, 1953, making a total tax paid of \$4,315.39, the Federal income tax shown to be due by said return.

17. On or about July 8, 1954, the plaintiff duly filed with the defendant a timely claim for refund of \$4,315.39, income tax paid for the year 1952. A true copy of said claim is attached to the Complaint and marked Exhibit "I", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

18. The plaintiff duly filed his Federal income

tax return for the calendar year 1953 with the above-named defendant. The plaintiff paid, on or before March 15, 1954, the amount of \$4,179.30, the Federal income tax shown to be due by said return.

19. On or about July 8, 1954, the plaintiff duly filed with the defendant a timely claim for refund of \$4,179.30, income tax paid for the year 1953. A true copy of said claim is attached to the Complaint and marked Exhibit "J", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

20. The plaintiff received \$10,000 in each of the years 1946, 1947, 1948, 1949, 1950, 1951, 1952, and 1953 under the "Lease Agreement and Purchase Option". Said amounts were reported and taxed as ordinary rental income in the plaintiff's Federal income tax returns for the years 1950, 1951, 1952, and 1953 and as partnership income in the previous years.

21. Prior to entering into the "Lease Agreement and Purchase Option", the plaintiff owned an undivided one-half interest in the property described therein. Said property had been held by the plaintiff for more than six months. The plaintiff's adjusted basis for determining gain under the Internal Revenue Code of 1939 with respect to said property was \$20,321.63 on January 14, 1946.

22. The Commissioner of Internal Revenue dis-

allowed the claims for refund for 1946, 1947, 1948, 1949, 1950, 1951, 1952, and 1953. The complaint in this case was filed within two years of the time of the receipt of all of the statutory disallowances of the aforesaid refund claims. However, as to the year 1946, see paragraph No. 5 above.

23. If the Court holds that the "Lease Agreement and Purchase Option" constitutes, for Federal income tax purposes, a sale or a conditional sale, then in order to conserve the time of the Court it is further stipulated that the parties will submit computations of amounts of over-payment to be entered for the respective years as judgment for plaintiff, and if the computations submitted by the parties differ in amount, the parties shall be afforded an opportunity to be heard in an argument on the date fixed by the Court and thereafter the Court will then determine the correct overpayment and enter its decision.

It is understood and agreed that any argument as to the correct computation of any overpayment shall be strictly confined to the consideration of the correct computation and shall not be used for the purpose of affording an opportunity for rehearing or reconsideration.

24. If the Court holds that the "Lease Agreement and Purchase Option" does not constitute, for Federal income tax purposes, a sale or a conditional sale, then it is further stipulated that the defendant is entitled to a judgment that the plain-

tiff's complaint be dismissed, together with the costs of the action.

Dated June 15, 1956.

FELT, FELT, & BURNETT,
/s/ By JACK W. BURNETT,
Attorneys for Plaintiff.

KREST CYR,
U. S. Attorney,
/s/ By JOHN H. REES,
Attorneys for Defendant.

[Endorsed]: Filed June 15, 1956.

[Title of District Court and Cause Nos. 1727-1728.]

OPINION

Both of the above entitled actions were brought for the recovery of Federal income taxes and interest paid for the taxable years 1946 to 1953, inclusive, and were consolidated for trial.

These actions are based upon the act of June 25, 1948, 62 Stat. 932, U.S.C., title 28, Sec. 1340 (stipulation of facts by the respective parties Par. 3.)

The sole issue herein, as claimed by the plaintiffs, is stated as follows:

“Does the so-called ‘Lease Agreement and Purchase Option’ constitute a conditional sales agreement for Federal income tax purposes resulting in the payments made thereunder being subject to capital gain tax treatment? Or, stated another

way, is the agreement to be treated as a true lease for Federal income tax purposes resulting in the yearly payments made thereunder being classified as rental income subject to ordinary income tax treatment”?

It also appears that facts relating to jurisdiction and to the amount of tax which the plaintiffs have paid during the years in question are agreed to in the stipulation of facts, and further, in paragraph 23 thereof, it appears that:

“the parties agreed that if the Court holds that the ‘lease agreement and purchase option’ constitutes, for Federal income tax purposes, a sale or a conditional sale, then, in order to conserve the time of the Court, the parties will submit computations of amounts of overpayments to be entered for the respective years as judgments for the plaintiffs, and if the computations by the parties differ in amount, the parties shall be afforded an opportunity to be heard in argument on the date fixed by the Court, and thereafter the Court will then determine the correct overpayment and enter its decision.”

At the outset the plaintiffs assert that they have established by competent proof that the so-called “Lease Agreement and Purchase Option” constitutes a conditional sales agreement for Federal income tax purposes.

But the defendant has also raised questions that require consideration in connection with the claims

of plaintiffs, such as, whether in Civil No. 1727 the Court has jurisdiction to enter judgment in favor of plaintiffs therein upon claims for refund filed March 19, 1951, for the year 1946, and upon other claims for refund that were timely filed for 1950, 1951, 1952 and 1953; whether in No. 1728, the Court has jurisdiction to enter a judgment in favor of plaintiffs therein upon refund claims which they timely filed in 1946, 1947, 1950, 1951, 1952, and 1953; whether under the language in the instrument "Lease Agreement and Purchase Option" executed January 14, 1946, and in a "memorandum agreement" executed later, certain payments received annually by the tax payers (\$10,000. in No. 1727, and \$9,000. in No. 1728) were made for the use and occupancy of their business property and properly reported by them for Federal income tax purposes as ordinary rental income upon returns which they voluntarily filed with the District Director for the calendar years 1946 through 1953; whether, if such annual payments were installment payments of the purchase price of realty sold in 1946 by the tax payers, as now claimed, and admitted gain was taxable either in 1946 or in installments, there are any overpayments by the tax payers not now barred from recovery by established principles of equity and good conscience applicable under the facts of record in each of the pending actions.

There seems to be no question that the plaintiffs have the burden of proof, and in a considera-

tion of the merits the issue is principally one of fact, and the question constantly arises in litigation of this nature whether the evidence shows conclusively from an equitable standpoint that the plaintiffs are entitled to a refund of money illegally withheld by the defendant. The parties in interest were all present when the agreement in question was signed, which was accepted by them without change, all apparently having a full understanding of the purport and legal effect of the agreement, which together with the intent of the parties in executing it would unquestionably under the rule relied upon be controlling. The payments made each year under the agreement from 1946 to 1953 by the Buttrey Co. were received by the plaintiffs and reported in their income tax returns as rental income. But in that connection it has been held that the Court will construe the agreement from its own independent judgment and is not bound by the name attached to it or an erroneous construction placed upon it. In *Watson v. Commissioner*, 62 F(2) 35 (9th Cir. 1932) the Court said:

“We have approached the construction of this agreement under the rule recognized by the Supreme Court in *Heryford v. Davis*, 102 U.S. 235, 244, where the Court said: “* * * (it) is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provision it contains, disconnected from all others, but in the ruling intention of the par-

ties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account.' ”

The Court held that the rentals so called, were not intended as rent, but were payments on account of the purchase price.

Among many other cases cited appears that of *Oesterreich v. Commissioner*, 226 F.(2) 798 (9th Cir. 1955) where the Court said that if the parties enter into a transaction which they honestly believe to be a lease, but which actually has all the elements of a contract of sale, it is a contract of sale regardless of what they call it. The Court cited section 23 (a) (1) (A) of the Internal Revenue Code of 1939, and said that if the lessee is either taking title to the property or has acquired an equity, it cannot treat the payments as rental expense.

The Court has gone over the evidence and authorities cited, and arguments made by counsel for the respective parties, in the voluminous briefs submitted, and after careful consideration thereof, is now ready to determine that it has been conclusively established that the Elliot brothers made a sale of their property to the Buttrey Company, and that it was so understood by both parties, and that the monthly rentals, so called, were installment payments on the purchase price, and that such is the construction to be placed upon the agreements here in question, and that they should

be treated accordingly for income tax purposes, and that proper refunds, to be determined later, should be made. Under the evidence the greater weight of authority seems to hold that the parties here intended to enter into an agreement for the sale of the property described therein.

William G. Elliot and Thomas W. Elliot, plaintiffs therein, had been the owners and operators of the Flathead Commercial Co. and the Buffalo block, a business property, situated in Kalispell, Montana, for many years, and they had decided to sell their property, and all of it, to the Buttrey Co., chiefly because of failing health, and for that purpose the parties, on January 14, 1946, entered into the "Lease Agreement and Purchase Option" and on February 1, 1946, executed the supplemental contract, known as "Memorandum Agreement." Buttrey Co., through their attorneys, prepared the agreement, and the Elliot Brothers, not represented by counsel, accepted and signed the agreements as prepared by counsel for Buttrey Co. It appears in evidence that the Elliot Brothers were unfamiliar with tax matters, and also with technical sales agreements, they relied upon Buttrey Co.'s counsel; they were simply selling their property and all of it.

On November 5, 1955, Buttrey Co. received from the escrow agent, upon final payment of the full purchase price, the deed, abstract of title and title opinion as of January 14, 1946. And, as it appears, the terms of the agreement had been per-

formed precisely as written therein, and the sale; as intended by the parties, was fully consummated. As stated by counsel:

“The comparison between the plaintiffs net rental income of some \$5,000. a year prior to entering into this agreement and their net ‘rental’ income of \$19,000. after the agreement was signed is further evidence that the \$19,000. payments were not true rent payments for the use of this property.”

The Court does not deem it necessary to go into all the details of evidence and arguments of counsel, or citation of authorities; the Court is convinced from its own examination and consideration thereof that the plaintiffs are entitled to a ruling in their favor, and such is the Order and decision of the Court herein.

Appropriate findings of fact and conclusions of law may be submitted accordingly, also form of judgment. The Court will again call the attention of counsel for the respective parties herein to the stipulation of facts in said cause, and especially to paragraph 23 therein.

Exception allowed Counsel.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 27, 1957.

[Title of District Court and Cause No. 1727.]

NOTICE OF APPEAL

Notice is hereby given that Thomas M. Robinson, the defendant named above, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the decision of Judge Charles N. Pray in an opinion filed June 27, 1957.

KREST CYR,

United States Attorney,

/s/ DALE F. GALLES,

Assistant U. S. Attorney,

Attorneys for Defendant.

[Endorsed]: Filed August 26, 1957.

[Title of District Court and Cause No. 1727.]

ORDER

Pursuant to the Application for Extension of Time of defendant, the United States of America, to perfect and docket the record on appeal herein, and good cause appearing therefor,—

It Is Now Ordered that the time within which the defendant may perfect and docket its appeal herein be, and hereby is, extended for a period of fifty (50) days.

Dated this 4th day of October, 1957.

/s/ W. J. JAMESON,

United States District Judge.

[Endorsed]: Filed Oct. 4, 1957. Entered Oct. 7, 1957.

[Title of District Court and Cause Nos. 1727 and 1728.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Upon the evidence submitted to the Court on the 15th day of June, 1956, and the agreed Stipulation of Facts submitted in the above entitled and numbered causes, which were consolidated for trial, the Court makes the following

Findings of Fact

1. That paragraphs numbered 1 to 22, inclusive, of the Stipulation of Facts, in Civil #1727, and paragraphs numbered 1 to 22, inclusive, of the Stipulation of Facts, as amended, in Civil #1728, and the Stipulation of Documentary Evidence, filed on June 15, 1956 in both actions, are adopted as Findings of Fact of the Court and they are made a part hereof by this reference;

2. That plaintiff's Exhibit No. 1 was stipulated as evidence in both actions and it is adopted as a part of the Findings of Fact of the Court and it is made a part hereof by this reference;

3. That Mr. Thomas Elliot, prior to the year 1946, was an officer and the manager and operator of the Flathead Commercial Company, a corporation, at Kalispell, Montana and that he ran the business of this company which was engaged in the sale of general merchandise and in the operation of a department store and that it had been in business since the 1920's;

4. That during 1945, Mr. Thomas Elliot was approached by the F. A. Buttrey Company (hereinafter called Buttrey Co.), a well-known Montana corporation which operates a number of retail department stores; that said company desired to purchase the business of the Flathead Commercial Company; that Buttrey Co. had previously discussed such a purchase but serious negotiations were not entered into until July or August of 1945; that late in 1945, Mr. Thomas Elliot decided, principally due to reasons of his health, to sell his store business, that is, the business of the Flathead Commercial Company; that negotiations were carried on in Billings in December of 1945 with representatives of Buttrey Co. and Mr. Thomas Elliot's brother, Mr. William Elliot, and his nephew, Mr. Howard Elliot, were also present; that during these negotiations, a final agreement was made for the sale of the goods and business of the Flathead Commercial Company to Buttrey Co. and that, subsequently, Mr. Thomas Elliot, as the President of the Flathead Commercial Company, executed an affidavit and statement as required by the Montana Bulk Sales Law (See Stipulation of Documentary Evidence);

5. That the business of the Flathead Commercial Company was conducted in a building known as the Buffalo Block in Kalispell, Montana;

6. That the Buffalo Block consisted of two stories and a basement and it contained store fronts, brick walls and the usual internal divisions supporting the walls; that the Buffalo Block had a

125-foot frontage on Main Street in Kalispell of which the Flathead Commercial Company occupied a 75-foot frontage thereof on the first floor and in the basement; that the remaining 50-foot frontage on the first floor and basement was occupied by Safeway Stores in 1945 and that the second floor consisted of office space which was rented to various tenants; that Safeway Stores held a lease on the space occupied by them which lease expired in 1947;

7. That the Buffalo Block was owned by Mr. Thomas Elliot and his brother, Mr. William Elliot, each owning an undivided one-half interest; that they had purchased this property in 1923;

8. That the Elliot brothers were engaged as partners in the operation of the Buffalo Block; that the income of the Buffalo Block consisted principally of the rentals from the two stores located on the main floor and that they also collected some rentals from the office space on the second story;

9. That, as shown by Plaintiffs' Exhibit #1, (See Para. 2 above), the total gross income from the various tenants of the Buffalo Block (as indicated in the table on the bottom of the exhibit) averaged approximately \$16,500 a year for the ten-year period commencing in 1936 and terminating at the end of 1945, that is, just prior to the execution of the so-called "Lease Agreement and Purchase Option" on January 14, 1946; that the expense of operating the Buffalo Block averaged

approximately \$9,500 a year and, as shown on the table at the top of the exhibit, such expense consisted of taxes, heat, office expense, repair, wages, light, water, insurance, and general expense and that, in addition, depreciation in the approximate amount of \$2,000 was incurred; that the average annual net income was, therefore, approximately \$5,000;

10. That during the negotiations with Buttrey Co. concerning the sale of the Flathead Commercial Company, there was no discussion regarding the purchase of the Buffalo Block but it was agreed at that time that Buttrey Co. would be allowed to take over the space then occupied by the Flathead Commercial Company; that Buttrey Co. offered to lease such space at \$775 a month for 15 years provided they were given the option to lease the space then occupied by Safeway Stores at \$425.35 a month at the expiration of Safeway Store's lease in 1947 or sooner should Safeway Stores vacate the premises; that these negotiations took place in Billings, Montana during December of 1945 but that no agreement was made at that time;

11. That, subsequent to January 1, 1946, the plaintiffs were again approached regarding the disposition of the Buffalo Block and these negotiations took place in Kalispell, Montana; that on January 14, 1946, in the law office of the attorneys representing Buttrey Co., the so-called "Lease Agreement and Purchase Option" was executed

and that on February 1, 1946, the supplemental "Memorandum Agreement" was executed; that the said agreements were prepared by the attorneys for Buttrey Co. and that the plaintiffs were not represented by any lawyer and they paid no legal fees in this matter; that the Elliot brothers were unfamiliar with tax matters, and also with technical sales agreements and that they relied upon Buttrey Co.'s attorneys; that they were simply selling their property and all of it;

12. That the above referred to agreements specified that an abstract of title, together with a title opinion and a warranty deed, wherein the plaintiffs conveyed the property to Buttrey Co., were to be placed in escrow in the Conrad National Bank at Kalispell, and this was done; that the agreements stated that the abstract of title, title opinion, and the warranty deed were to be delivered to Buttrey Co. by said bank provided that full payment was made therefor.

13. That after the execution of the agreements, the plaintiffs vacated the premises and subsequent to that time they did not pay any expenses in connection with the Buffalo Block, including real estate taxes or repairs, nor did they collect any rentals from any of the tenants of the building; that the plaintiffs completely terminated their relation with the management and control of the building, except to make sure that the insurance was kept up; That in Paragraph 4 of the agreement, it is provided that fire insurance in the

amount of at least \$175,000 be maintained by Buttrey Co. and that Buttrey Co. later increased the amount of insurance on the building, without being requested to do so by the plaintiffs, to the sum of \$250,000;

14. That the fair market value of the property known as the Buffalo Block on January 14, 1946 was approximately \$200,000.

15. That it was intended that Buttrey Co. would make the final \$75,000 payment referred to in the agreement and that a provision of the "Memorandum Agreement" provided that the parties contemplated the making of this payment and that it was, in fact, made on November 5, 1955; that the agreements were completely performed on that date, that is, the plaintiffs had received all of the payments provided for therein and Buttrey Co. received the deed, abstract, and title opinion from the escrowee; that the terms of the agreement had been performed precisely as written therein and were fully consummated and that the agreements constituted a sales agreement and were intended as such by the parties;

16. That it has been conclusively established that the Elliot brothers did, in fact, make a sale of their property to Buttrey Co. and that it was so understood by both parties, and that the yearly rentals, so called, were installment payments on the purchase price, and that such is the construction to be placed upon the agreements in question,

and that they should be treated accordingly for Federal income tax purposes.

17. That the parties hereto, by their respective counsel, have entered into a stipulation regarding the amounts of overpayments wherein the parties agree, that for the purpose of these actions, the correct amounts of overpayments are deemed to be as follows:

Civil #1727
Overpayments

Year	Tax	Interest	Total
1946	\$ —0—	\$ —0—	\$ —0—
1947	3,110.39	52.30	3,162.69
1948	1,431.59	98.03	1,529.62
1949	1,323.43	114.21	1,437.64
1950	1,436.66	12.90	1,449.56
1951	1,628.40		1,628.40
1952	1,790.66	7.96	1,798.62
1953	1,762.31		1,762.31

Civil #1728
Overpayments

Year	Tax	Interest	Total
1946	\$ —0—	\$ —0—	\$ —0—
1947	—0—	—0—	—0—
1948	986.12		986.12
1949	977.72	.54	978.26
1950	1,401.32	113.48	1,514.80
1951	1,693.56		1,693.56
1952	2,844.56		2,844.56
1953	2,419.42		2,419.42

18. That the plaintiffs are entitled to refunds of the above set forth tax overpayments and the above set forth interest payments, together with interest thereon, and that there is no fatal variance between the refund claims filed for all of these years and the complaints filed herein and that there

is no procedural or substantive rule of law which prohibits the making of these refunds.

Conclusions of Law

1. That the plaintiffs sold the property known as the Buffalo Block to Buttrey Co. pursuant to the agreements referred to above;

2. That the so-called yearly rentals were installment payments on the purchase price, and that they should be treated accordingly for Federal income tax purposes.

3. That such installment payments are subject to long-term capital gain taxation under Section 117 of the 1939 Internal Revenue Code and accordingly the plaintiffs are entitled to receive refunds of tax overpayments, the amounts of which have been stipulated to by the parties and that judgments will be entered for such amounts.

4. That there is no procedural or substantive rule of law which prohibits that judgments be entered for the refunding of the above referred to overpayments.

5. That pursuant to the stipulations of the parties hereto, no refunds shall be made for the 1946 taxable year in case #1727 nor for the 1946 nor 1947 taxable years in case #1728.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed October 31, 1957.

In The United States District Court, District
of Montana, Billings Division

Civil No. 1727

WILLIAM G. ELLIOT, Plaintiff,

v.

THOMAS M. ROBINSON, Defendant.

JUDGMENT

This cause came on regularly to be heard on the 15th day of June, 1956. The plaintiff appeared by his attorneys, Messrs. James R. Felt and Jack W. Burnett, also Jerome Anderson. The defendant appeared by his attorneys, Dale Galles, Assistant United States Attorney, and John A. Rees, Special Assistant to the Attorney General. Evidence, both oral and written, was submitted. Within the time allowed therefor both parties filed typewritten briefs, requested Findings of Facts, and Conclusions of Law. The Court, being fully advised in the premises, made and filed a typewritten Opinion, Findings of Fact, and Conclusions of Law.

Now, therefore, in accordance with such Findings, Conclusions, and Opinion heretofore entered and filed,

It is Ordered, Adjudged, and Decreed that the plaintiff, William G. Elliot, have and recover judgment against the defendant, Thomas M. Robinson, in the sum of \$12,768.84 with interest thereon as provided by law, and his costs allowed by law.

Done this 31st day of October, 1957.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed and Entered October 31,
1957.

[Title of District Court and Cause No. 1727.]

CERTIFICATE OF PROBABLE CAUSE

Under authority provided in 28 U.S.C. 2006, pursuant to Rule 69(b) of the Federal Rules of Civil Procedure, the Court finds that the defendant as District Director of Internal Revenue acted under the direction of the Commissioner of Internal Revenue and upon probable cause in the collection of taxes found to be due and owing from him to the plaintiff in the above-entitled action for which a judgment has been entered. A certificate of probable cause should therefore be granted.

Wherefore, it is ordered that a certificate of probable cause be and the same hereby is issued and entered in the above-entitled action and the defendant, Thomas M. Robinson, District Director of Internal Revenue for the Collection District of Montana, is hereby ordered relieved from the payment of said judgment and it is ordered paid out of the proper appropriation from the United States Treasury.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed October 31, 1957.

[Title of District Court and Cause Nos. 1727 and 1728.]

STIPULATION RE AMOUNTS OF OVERPAYMENTS

Pursuant to the Order and decision of the court filed June 27, 1957 in the above-entitled actions and also pursuant to Paragraph 23 of the Stipulations of Facts in said actions, the counsel for the respective parties have entered into this agreement involving the amounts of overpayments in the above entitled actions as follows:

1. That, for the purpose of these actions, the parties agree that the correct amounts of overpayments by the plaintiffs herein, are as follows:

Civil #1727 Overpayments

Year	Tax	Interest	Total
1946	\$ —0—	\$ —0—	\$ —0—
1947	3,110.39	52.30	3,162.69
1948	1,431.59	98.03	1,529.62
1949	1,323.43	114.21	1,437.64
1950	1,436.66	12.90	1,449.56
1951	1,628.40		1,628.40
1952	1,790.66	7.96	1,798.62
1953	1,762.31		1,762.31

Civil #1728 Overpayments

Year	Tax	Interest	Total
1946	\$ —0—	\$ —0—	\$ —0—
1947	—0—	—0—	—0—
1948	986.12		986.12
1949	977.72	.54	978.26
1950	1,401.32	113.48	1,514.80
1951	1,693.56		1,693.56
1952	2,844.56		2,844.56
1953	2,419.42		2,419.42

Dated September 30th, 1957.

FELT, FELT, & BURNETT,
/s/ By JACK W. BURNETT,
Attorneys for Plaintiffs.

UNITED STATES ATTORNEY
/s/ By DALE F. GALLES,
Attorney for Defendant.

[Endorsed]: Filed October 31, 1957.

[Title of District Court and Cause No. 1727.]

NOTICE OF APPEAL

Notice is hereby given that Thomas M. Robinson, the defendant named above, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment of the above-entitled Court filed October 31, 1957.

KREST CYR,
United States Attorney,

/s/ DALE F. GALLES,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed December 30, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the documents accompanying this certificate, to wit:

1. Judgment roll filed October 31, 1957, in Civil 1727,
2. Judgment roll filed October 31, 1957, in Civil 1728,
3. Stipulation filed August 4, 1955, in Civil 1727,
4. Stipulation filed August 4, 1955, in Civil 1728,
5. Order Enlarging Time filed August 6, 1955, in Civil 1727,
6. Order Enlarging Time filed August 6, 1955, in Civil 1728,
7. Motion filed Dec. 13, 1955, in Civil 1727,
8. Motion filed Dec. 13, 1955, in Civil 1728,
9. Consolidation for Trial filed June 15, 1956,
10. Stipulation on Documentary Evidence filed June 15, 1956,
11. Transcript of Evidence filed July 30, 1956,
13. Brief for the Plaintiffs filed December 22, 1956,
14. Correction of Transcript filed February 9, 1957,

15. Affidavit of Service by Mail filed February 19, 1957,
 16. Brief for Defendant filed February 19, 1957,
 17. Affidavit of Service by Mail filed March 12, 1957,
 18. Reply for Plaintiffs filed March 12, 1957,
 19. Certificate of Mailing filed April 26, 1957,
 20. Brief for Defendant in Rebuttal filed April 26, 1957,
 21. Notice of Appeal filed August 26, 1957, in Civil 1727,
 22. Notice of Appeal filed August 26, 1957, in Civil 1728,
 23. Order filed October 4, 1957, in Civil 1727,
 24. Order filed October 4, 1957, in Civil 1728,
 25. Application for Extension of Time filed Oct. 4, 1957, in Civil 1727,
 26. Application for Extension of Time filed Oct. 4, 1957, in Civil 1728,
 27. Certificate of Probable Cause filed Oct. 31, 1957, in Civil 1727,
 28. Certificate of Probable Cause filed Oct. 31, 1957, in Civil 1728,
 29. Stipulation re Amount of Overpayment filed Oct. 31, 1957,
 30. Notice of Appeal filed Dec. 30, 1957, in Civil 1727,
 31. Notice of Appeal filed Dec. 30, 1957, in Civil 1728,
- Stipulation as to Record on Appeal filed Mar. 25, 1958,

Rule 73(g) of the Federal Rules of Civil Procedure.

Dated this 7th day of February, 1958.

/s/ W. J. JAMESON,
U. S. District Judge.

[Endorsed]: Filed February 7, 1958 and Entered February 10, 1958.

[Title of District Court and Cause No. 1727.]

DOCKET ENTRIES

1955

May 25—Filed Complaint.

May 27—Issued Summons & 3 copies. Mailed to Marshal at Butte.

Jun. 29—Filed Summons — Served June 20th and June 24th.

Aug. 4—Filed Stipulation granting defendant 60 days additional time to plead.

Aug. 6—Filed and entered Order extending time to plead—60 days.

Oct. 5—Filed Answer of Deft.

Dec. 13—Filed Plaintiff's Motion for a pre-trial conference.

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Jun. 1—Entered Order motion granted.

Jun. 1—Entered Order case noted for trial.

Jun. 6—Entered Order case set for pre-trial conference, and for trial, on June 15, 1956—10 a.m.

Jun. 15—Filed Consolidation for trial, with case #1728.

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- Jun. 15—Entered Order consolidating case #1727 with case #1728 for trial.
- Jun. 15—Filed Amendment to Complaint.
- Jun. 15—Filed Stipulation of Facts.
- Jun. 15—Filed Stipulation of documentary evidence.
- Jun. 15—Entered record of trial, 60 days to Plaintiff for opening brief—30 days to defendant for answering brief, and 20 days for reply brief.
- July 30—Filed Reporter's Notes.
- July 30—Filed Reporter's Transcript.
- Oct. 23—Filed Receipt for Original Exhibit Plffs. #1, withdrawn, & copy substituted.
- Nov. 28—Entered Order extending time for filing of Plffs. Brief to Dec. 31, 1956.
- Dec. 22—Filed Plaintiff's Brief.

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- Feb. 9—Filed Stipulation for correction of Transcript.
- Feb. 19—Filed Defendant's Brief.
- Feb. 19—Filed Affidavit of service of Brief by mail.
- Mar. 12—Filed Reply Brief for Plaintiff.
- Mar. 12—Filed Affidavit of Service by Mail.
- Apr. 26—Filed Brief for the Defendant in Rebuttal.
- Apr. 26—Filed Certificate of mailing.
- Jun. 27—Filed Opinion and Order included therein, ruling in favor of Plaintiff.

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- Jun. 27—Entered Order for Judgment to be rendered in favor of Plaintiff.
- Jun. 27—Mailed copy Opinion to counsel for each side; (Felt, Felt & Burnett for Plff. and U. S. Attorney, Billings, for Deft.).
- Aug. 26—Filed Notice of Appeal by Defendant.
- Aug. 28—Mailed copy Notice of Appeal to counsel for plaintiff.
- Oct. 4—Filed Defendant's application for extension of time to docket record on appeal.
- Oct. 4—Filed Order extending time to docket record on appeal for 50 days.
- Oct. 7—Entered and noted herein, Order extending time to docket record on appeal for 50 days.
- Oct. 31—Defendant's proposed Findings of Fact & Conclusions of Law lodged with Clerk.
- Oct. 31—Filed Stipulation of amounts of overpayments, applying to this case and to case No. 1728—Thomas W. Elliot et al. vs. Thomas M. Robinson.
- Oct. 31—Filed Findings of Fact and Conclusions of Law to apply herein and also to Case No. 1728, Thomas W. Elliot et al. vs. Thomas M. Robinson.
- Oct. 31—Filed and entered Judgment for Plaintiff and against defendant for \$12,768.84 with interest and costs.
- Oct. 31—Mailed Notice of entry of Judgment to all counsel herein.
- Oct. 31—Filed Certificate of Probable Cause.

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Oct. 31—Filed Judgment Roll.

Dec. 30—Filed Defendant's Notice of Appeal.

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Feb. 7—Filed Defendant's Application for Extension of time to docket appeal.

Feb. 7—Filed Order for extension of time to docket appeal.

Feb. 10—Entered Order granting defendant 50 days additional time to docket record on appeal.

Mar. 25—Filed Stipulation as to contents of record on appeal.

Mar. 26—Mailed Record on Appeal to Clerk U. S. Court of Appeals, Box 547, San Francisco, Calif., from Billings Clerk's Office.

Apr. 8—Filed Supplemental Stipulation as to Record on Appeal for this case and Case No. 1728.

[Title of District Court and Causes.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers consisting of:

Docket Entries, Civil No. 1727,

Docket Entries, Civil No. 1728,

Order, filed Feb. 7, 1958, Civil No. 1727,

[Endorsed]: No. 15983. United States Court of Appeals for the Ninth Circuit. Thomas M. Robinson, Appellant, vs. William G. Elliot, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: March 28, 1958.

Docketed: April 10, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15983

THOMAS M. ROBINSON, Appellant,

vs.

WILLIAM G. ELLIOT, Appellee.

STATEMENT OF POINTS UPON WHICH
DEFENDANT-APPELLANT INTENDS TO
RELY

The District Court erred in the following respects:

I.

In concluding and holding in the opinion that the plaintiffs made a sale of their property to the Buttrety Company in 1946 or at any time prior to 1955;

that it was so understood by both parties; and that the annual rentals, so called, were installment payments on the purchase price.

II.

In making findings of fact numbered 15, 16, 17 and 18, the last sentence in finding 11, also in not finding as a fact or concluding as a matter of law that:

a. The parties, and certainly the purchaser, did not intend to make an agreement of immediate sale in 1946;

b. No conditional sale was made;

c. The Buttrey Company was not obligated to buy the property, and it acquired no equity in such property until 1955 when the option was exercised;

d. The return as ordinary rental income by the plaintiffs-appellees of the payments which they received from the Buttrey Company bars their claims that such income should be treated as gain from the sale of a capital asset;

e. The complaints did not predicate any recovery upon an alleged sale in 1946 at a profit taxable in that year as capital gain;

f. The plaintiffs-appellees offered no proof, and there is no evidence of record, to show any promise by the Buttrey Company which had a fair market value in 1946; and

g. The absence of any proof of an election by the plaintiffs-appellees to report gain from a sale upon the installment basis precludes any capital gain treatment for years after 1946.

III.

In making conclusions of law numbered 1, 2, 3 and 4, also in not concluding and holding that formal claims for refund, Exhibits H, I and J attached to the complaint in Civil No. 1727, also Exhibits E, F, G and H attached to the complaint in Civil No. 1728, each set forth a ground at variance with and wholly different from the ground of the claim for recovery in such complaints, and that such variance deprived the Court of jurisdiction for the years 1951 to 1953, both inclusive, in Civil No. 1727, also for the years 1950 and 1953, both inclusive, in Civil No. 1728.

IV.

In not entering judgments in defendant-appellant's favor and against the plaintiffs-appellees.

Dated: April 7, 1958.

KREST CYR,

United States Attorney for the District of Montana.

/s/ DALE F. GALLES,

Assistant U. S. Attorney for the District of Montana. Attorneys for Defendant-Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 10, 1958. Paul P. O'Brien, Clerk.

